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On page 388 of this issue will be found a compilation of authorities on a constitutional subject of growing modern interest, viz., the nature of the majority required in favor of questions submitted to a popular vote. The annotation appears in connection with the recent Idaho case of Green v. State Board of Canvassers, wherein it was held that under the provisions of the constitution, providing for the amendment thereof where a majority of the electors voting upon that question vote in favor of the amendment, the same is ratified although the votes thus cast are not a majority of the votes cast at the general election for State officers. A later decision on the subject, not included in the annotation, is Citizens of De Soto Parish v. Williams, 21 South. Rep. 647, wherein the Supreme Court of Louisiana decides that what is meant by the phrase "by a vote of the majority of the property tax payers in numbers and in value" occurring in the constitution is a majority of the property taxpayers actually present and voting at an election, and that all qualified property taxpayers who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

It is alleged to be the doctrine of the common law and at least has been held in England since the days of Coke, though not unbrokenly nor without now and then hostile criticism from bench and bar, that an agreement by a creditor with his debtor to accept a smaller sum of money in satisfaction of an ascertained debt of a greater sum is without consideration and is not binding upon the creditor, even though he has received the smaller sum agreed upon in the new contract. And in the United States, blindly following what was supposed to be the settled law in England for years, our courts have uniformly announced adherence to this rule. The Supreme Court of Mississippi in the case of Clayton v. Clark, has recently struggled with the question and has boldly dissented from the proposition so long upheld, in an opinion full of vigor and logical reasoning. They hold in terms that the acceptance by the payee of a note of a less sum in payment than that actually due under the terms of the note, on the distinct agreement that such payment shall extinguish the debt evidenced by the note, operates to satisfy the note and discharge the debtor. The contrary rule is, in nearly all the cases declared to have been first announced in Pinnel's Case, 5 Coke, 117*a*, whereas an examination of that case, as the Mississippi court shows, does not seem to justify such an interpretation. Pinnel's plea was that before the maturity of his bond for the larger sum plaintiff had accepted the lesser sum agreed upon between the parties in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel, in that remote period when courts were almost as jealous for the observance of technical rules of special pleading as for the execution of justice according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him because of his "insufficient" pleading; "for," says Coke, "he did not plead that he had paid the £5. 2s. 2d. in full satisfaction (as by law he ought), but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction." "However amusing and absurd," says the Supreme Court of Mississippi "this may appear to us, it was the point decided in Pinnel's Case; and the question before us was not only not decided, but it was impossible that it should have been. There Pinnel pleaded payment of the lesser sum before the date of the maturity of the greater sum named in the bond, and its acceptance by his creditor, in full satisfaction; and he lost, unhappy wretch that he was, born two or three centuries too soon, and not knowing the difference betwixt legal tweedle-dum and legal tweedle-dee, because he pleaded that he paid a part of the greater original sum, and that the plaintiff accepted it in full satisfaction, and did not plead that he paid it in full satisfaction. The rule is found in Pinnel's Case, but it is bold

dictum, and, as stated by Lord Blackburn in Foakes v. Beer, before the House of Lords (9 App. Cas. 605), for the long period of 115 years after Pinnel's Case was decided no case is to be found "in which the question was raised whether payment of a lesser sum could be satisfaction of a liquidated demand."

The Mississippi court quote with approbation the observations following, with which Lord Blackburn concluded his opinion, intended to show that Coke was mistaken as to fact as well as law in endeavoring to uphold the rule announced by the dictum in Pinnel's Case that the new agreement to pay a lesser sum is void because unsupported by any consideration; that is, that no benefit, in such case, inured to the creditor, viz: "What principally weighs with me in thinking that Lord Coke made a mistake of fact, is my conviction that all men of business, whether merchants or tradesmen do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent and sure to pay at last this often is so. Where the credit of the debtor is doubtful it must be more so." Turning to the holdings of the American courts on this question the Mississippi court is "profoundly and painfully impressed with the slavish adherence of the legal and judicial minds to precedent or in many cases to what seems to be precedent." The court then considers such cases and either distinguishes or repudiates them. Attention is called to Harper v. Graham, 20 Ohio, 105, wherein the absurdity of the old and technical doctrine is exposed. There is much force in the following words with which the Mississippi Court concludes its opinion: "However it may have seemed 300 years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day, and in this country, where almost every man is in some way or other engaged in trade or commerce, t is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor. Why shall not money — the thing sought to be secured be new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and whomsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth $100 in full satisfaction of a promissory note for $1,000, and be bound thereby, and yet not be legally bound by his agreement to accept $999, and his actual acceptance of it, in full satisfaction of the $1,000 note? No reason can be assigned except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it." The court further demonstrates its consistency by overruling some of its own earlier opinions.

NOTES OF RECENT DECISIONS.

AUCTIONS—FRAUD — PUFFING.—Flannery v. Jones, decided by the Supreme Court of Pennsylvania, is an instructive case on the subject of the illegality of fictitious bids at an auction. The holding of the court is that for an auctioneer at sale of property, offered without reserve, to make fictitious bid at the instance of the owner is a fraud which cannot be legalized by custom and releases the purchaser. The court says:

In the case of Rigg v. Schweitzer, affirmed in 170 Pa. St, 549, 33 Atl. Rep. 116, we had occasion to review the law with regard to fraud in bidding, and the authorities are cited therein. I specially refer to Yerkes v. Wilson, *81 Pa. St. 10, where it was held that the employment of puffers by owners to bid up property selling at auction with a view of raising the price on *bona fide* bidders is a fraud upon them, and will avoid the sale at the option of the purchaser, and in the trial of such questions of fraud every circumstance or fact from which a legal inference of fraud may be drawn is evidence; that a reservation in conditions of a public sale to the owners of an open bid for themselves is proper, but, the owner having made a secret bid, the sale was set aside. The case of Bexwell v. Christie, Cowp. 395, affirmed by our supreme court in Staines v. Shore, 16 Pa. St. 200, and Pennock's Appeal, 14 Pa. St. 446, is so pertinent to the subject that I quote from it as follows: "The question, then, is whether the owner can privately employ another person to bid for him. The basis of all dealings ought to be good faith, for, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder, that could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose; yet tricks and practices of that kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest, in their own defense. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner; for, if he is unwilling his goods should go at an underprice, he may order them to be set up at his own price, and not lower. Such a direction would be fair. Or he might do as was done by Lord Ashburnham, who sold a large estate by auction. He had inserted in the conditions of sale that he himself might bid once in the course of the sale, and he bid at once £15,000 or £20,000. Such a condition is fair, because the public are then apprised, and know upon what terms they bid. In Holland it is the practice to bid downwards. The question, then, is, is such a bidding fair? If not, it is no argument to say it is a frequent custom. Gaming, stock-jobbing, and swindling are frequent. But the law forbids them all. Suppose there was an agreement to abate so much, which is the case where goods are sold by one person in the trade to another. They abate sometimes 10 or 15 per cent. Such an agreement between the owner and bidder, at a sale by auction, would be a gross fraud. What is the nature of a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and seller. He may fairly bid for a third person who employs him, but not for the owner." In Wheeler v. Collier, Moody & M. 123, Lord Tenterden, C. J., said: "If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, and although he is only to bid up to a certain sum, unless it is announced at the time that there is a person bidding for the owner."

An excellent review of these various authorities appears in the case of Towle v. Leevitt, 23 N. H. 360, wherein the court adopted the remarks of Chancellor Kent (2 Kent, Comm. *539), as the true doctrine, to-wit, that "in sound policy no person ought in any case to be employed secretly to bid for the owner against a *bona fide* bidder at a public auction. It is a fraud in law on the very face of the transaction, and the owner's interference and right to bid ought to be intimated in the conditions of sale." In support of all these findings, and especially the fifth, I cite Staines v. Shore, 16 Pa. St. 200, wherein the supreme court held that it made no difference that without the bids of employed puffers the property would go for less than its value, and, commenting upon the ruling of the court below, said: "The ruling judge instructed the jury that, if the horse was actually worth the sum to be paid for him, the buyer got the value of his money, and could not have been defrauded. The fallacy of the principle is in assuming that there is a standard of value independent of the wishes and wants of the bidders, and that every man is willing to buy by it. * * * A man is defrauded whenever he is incited by artful means to bid more than he otherwise would. He has a right to buy at an undervalue, where the necessities of the owner compel him to sell; and whenever the price is ever so little enhanced by a secret contrivance, he is cheated. A sale by auction presupposes a sacrifice, or at least a willingness to sell for what can be had; but, should the vendor stick for the last penny, it would be idle to set the property up, because his price could be as readily obtained at private sale. * * * If the owner proposes to sell without reservation as to price, let him openly reserve a right to bid. For no fair purpose is the employment of a puffer necessary, and it must vitiate every sale in which recourse is had to it." Rigg v. Schweitzer, *supra*, does not rule this question against the plaintiff.

INJUNCTION — PURCHASE OF INTEREST IN NEWSPAPER — CONTROL AS EDITOR.—One of the points decided by the Supreme Court of Missouri, in Jones v. Williams, 39 S. W. Rep. 486, is that one who purchases an interest in the stock of a corporation, and, in consideration thereof, is to be editor and manager and have control of its newspaper, for a definite time, at a fixed salary, is entitled to have his control protected by injunction, remedy at law not being adequate. The opinion, which discusses several interesting questions growing out of the main point passed on, concludes as follows:

Is there such a want of mutuality of remedy as will prevent a court of equity from granting injunctive relief? Under the contract, plaintiff was appointed editor and manager of the *Post-Dispatch*. These duties require personal services, which it may be agreed a court of equity could not enforce. It could not, by decree, compel an editor to write editorials or to give direction to the business. But this want of power in the courts is supplied in the contract itself. While Mr. Pulitzer expresses the utmost confidence in plaintiff, and his willingness and ability to discharge his duties with fidelity, his own business instincts are too acute to allow the contract to rest in confidence alone. The corporation was organized "for pecuniary profit and gain." Rev. St., 1889, sec. 2771, subd. 11. Mr. Pulitzer does not lose sight of the primary objects to be accomplished. He

expressly fixes a pecuniary test of ability and fidelity. The contract provides: "And it is further agreed by and between the parties hereto, as a test of the ability of the party of the second part to properly manage and edit said St. Louis *Post-Dispatch*, that such appointment and salary shall cease and determine in the event that the gross revenues of the *Post-Dispatch* from advertising and circulation combined shall, during the year 1895, be less than the gross revenues from the same sources combined were for the year 1894. And it is further agreed by and between the parties hereto that said appointment and salary shall cease and determine in the event that the net profits of the *Post-Dispatch* for the year 1896 shall be less than the net profits for the year 1895. And it is further agreed by and between the parties hereto, their executors, administrators, or assigns, that in the case of the death of the party of the second part, his resignation, failure of health, or retirement, or inability to perform the duties and labors of editor and manager of the *Post-Dispatch* at any time within three years from the date of the execution of this contract, the party of the first part shall have the option to repurchase for the sum of eighty thousand dollars ($80,000) the herein mentioned one thousand six hundred and sixty-seven (1,667) shares of the stock of the Pulitzer Publishing Company, which in such event the party of the second part agrees to sell and transfer to the party of the first part for said sum of eighty thousand dollars ($80,000)." It is further provided that the appointment and salary should cease if plaintiff should "at any time during said term accept or occupy any public or political office, elective or otherwise, or engage in any other business, of any kind or description." The test of duty and liability is thus expressly agreed upon, which is absolutely determinable, and does not depend upon the views or opinions of either party. The failure to come up to the test is followed by a forfeiture of the position and salary. The test is success. The remedy, in case of failure for any of the causes, is removal from position and forfeiture of contract. Should plaintiff fail to perform his contract according to the tests provided, and should then persist in controlling the paper, in disregard of the provision that the appointment should cease, there can be no doubt that a court of equity would enjoin his interference, just as it can enjoin an interference with his rights if threatened. Keeping in view all the time that the right to manage and control the newspaper is the matter in issue, it is apparent that the remedy is natural. The question is, are the defendants entitled to the control? A court of equity can answer the question, and enforce its conclusions, on the petition of either party. Defendants could, undoubtedly, charge by cross bill that plaintiff had failed to perform the conditions of the contract, and had forfeited his right to control, and, if proved, the court could require plaintiff to allow them to resume control and enjoin an interference with it.

The law is well settled that personal contracts for service will not, because they cannot be enforced by courts of equity. But we do not view the duties to be performed by plaintiff under the contract as mere personal service or simple employment. In his control and management of the paper he knows no master or employer. He is answerable to no one for the manner of performing his duty. He is accountable only for the stipulated results. His position gives him a property right in the possession, control and management of the paper he agrees to edit and manage. A reading of the contract will show that the central idea of the executory part of it is the control and management of the paper. That means the possession and use of the property, and not mere employment to write editorials.

RIGHT OF A CREDITOR TO SUE AND ATTACH BEFORE EXPIRATION OF THE CREDIT.

The statute laws of many of the States contain no provisions by which a creditor is permitted to attach before maturity of his debt, the effects of a debtor who fraudulently obtained credit for goods, or who is about to abscond from the jurisdiction with his property, or who is disposing of his effects for the purpose of hindering, delaying and defrauding his creditors. The question therefore arises, whether a creditor may have an attachment under such circumstances before maturity of his debt, in the absence of an express statutory concession of the right. This question depends mainly upon another, namely, whether the defrauded vendor may maintain *assumpsit* for the price of the goods before the expiration of the credit. The general rule of the common law undoubtedly is that no action can be maintained to recover a debt which has not yet matured.[1] If the debt be for the purchase price of goods, and the purchase was effected by means of the fraudulent representations of the buyer, the purchaser must nevertheless await the expiration of the credit before he can maintain an action for the price; for such an action waives the fraud and affirms the contract.[2] The vendor, however, may disaffirm the contract and sue in replevin to recover the goods themselves, or in trover to recover their value, treating them as having been wrongfully gotten possession of by the purchaser and converted to his use.[3] These two actions amount to an election on the part of the seller to treat the contract as void, and it is therefore immaterial, with respect to his right to maintain them, whether the credit had or had not expired at the time when they were instituted. But they are *ex delicto* in form,

[1] 2 Stark. Ev. 55; Musser v. Price, 4 East, 132; Dutton v. Solomonson, 3 Bos. & Pul. 584.

[2] Chitty Cont. (10th Am. Ed.), 432; Ferguson v. Carrington, 9 Barn. & Cres. 59.

[3] Chitty Cont. *Id.*; Ferguson v. Carrington, 9 Barn. & Cres. 59; Strutt v. Smith, 1 C. M. & R. 312; Selway v. Fogg, 5 Mees. & W. 83.

and the gist of them is a tort committed by the defendant; hence they cannot be aided by attachment in any of the States in which attachments are allowed only in suits to recover a debt or damages for the breach of a contract. In consequence of these principles, it is settled law in several of the States that no action can be maintained, and no attachment sued out, in any case in which the debt of the plaintiff has not matured, whether the defendant was or was not guilty of fraud in the procuration of the credit.[4] Two important modifications of this doctrine of the common law have been established, both by English and American decisions. The first is, that in any case in which the vendor has been fraudulently induced by the purchaser to accept an invalid or worthless note, bill, or other security for the price of the goods, such security and the credit incidental thereto, may be ignored, and an action immediately brought to recover the value of the goods.[5] These decisions proceed upon the idea that the security being a nullity, the law immediately implies an undertaking on the part of the purchaser to make present payment of the price of the goods. The second modification is, that if the purchaser has resold the goods before the expiration of the fraudulently procured credit and received the proceeds, the vendor may at once maintain *assumpsit* against him, upon the ground that no title to the goods passed by reason of the fraud, and that therefore the proceeds of the resale were so much money received by the defendant to the use of the plaintiff, the original vendor.[6] It is perhaps not easy to distinguish such a case in principle from those in which the right to maintain an action for the price is denied; but it must be admitted that the exception so established is eminently reasonable and just toward the vendor, and productive of no injustice to the purchaser. The common law rule that no action can be maintained for the price of goods until the credit upon which they were sold has expired, even where the credit was fraudulently procured, has not been respected in all of the American courts. In the State of New York the contrary rule is firmly settled.[7] The decisions in that State repudiate the English doctrine that the law will not substitute for the express contract to pay at a future day, an implied contract on the part of the fraudulent purchaser to make present payment. They rest largely upon the principle announced in the leading case of Moses v. McPherlan,[8] that *assumpsit* will lie in any case to recover money which the defendant *ex æquo et bono*, ought not to retain in his hands; and upon the further principle that one who has a right of action *ex contractu*, and a right of action *ex delicto* growing out of the same transaction, may waive the tort and sue on the contract—the implied contract in this case, the express contract being treated as a nullity. The parties are presumed to stand upon the rights and obligations resulting from a delivery of the goods. The buyer cannot complain, because he is presumed to know that his fraud avoids the express contract, and makes him by implication of law liable to pay immediately upon delivery of the goods. He cannot be permitted to take advantage of his own wrong to set up a formal, technical, objection against the vendor's recovery. The New York decisions have been followed in Kentucky, and perhaps in other States.[9]

It remains to be considered whether the common law rule which prohibits an action of *assumpsit* before the expiration of a fraudulently procured credit, is affected by the

[4] Galloway v. Holmes, 1 Mich. 330; Emerson v. Steel Co., 100 Mich. 133; Jones v. Brown, 167 Pa. St. 395; Kellogg v. Turpie, 93 Ill. 265; Schilling v. Beane, 36 Ill. App. 513; Butler Printing Co. v. Reagan Paper Co., 35 Ill. App. 152; Dellone v. Hull, 47 Md. 112; Allen v. Ford, 19 Pick. (Mass.) 217.

[5] Chitty on Bills, 196; Puckford v. Maxwell, 6 D. & E. 52; Stedman v. Gooch, 1 Esp. 3; Manfrs. Nat. Bank v. Gore, 15 Mass. 75; Montgomery v. Forbes, 148 Mass. 249; Wilson v. Force, 6 Johns. (N. Y.) 109; Pierce v. Drake, 15 Johns. (N. Y.) 475.

[6] Benjamin on Sales (Bennett's Am. Ed.), 445, note; Bennett v. Francis, 2 Bos. & Pul. 554; Jones v. Hoar, 5 Pick. (Mass.) 285; Mann v. Stowell, 3 Pinney (Wis.), 220; Barrett v. Koella, 5 Biss. Cir. Ct. (U. S.) 40; Willet v. Willet, 3 Watts (Pa.), 277; Kellogg v. Turpie, 93 Ill. 265; Creel v. Kirkham, 47 Ill. 344; Johnston v. Salisbury, 61 Ill. 316.

[7] Roth v. Palmer, 27 Barb. (N. Y.) 652; Wilson v. Force, 6 Johns. (N. Y. 110; Weigand v. Sichel, 3 Keyes (N. Y.), 120; Phillips v. Wortendyke, 31 Hun (N. Y.), 192; Reid v. Martin, 4 Hun (N. Y.), 590; Bach v. Tuch, 126 N. Y. 53; Crossman v. Rubber Co., (N. Y.); 27 N. E. Rep. 400; Eppens v. McGrath, 3 N. Y. Supp. 213; White v. Harrison, 1 City Ct. Rep. (N. Y.) 482.

[8] 2 Burr, 1012; 1 W. Bl. 219.

[9] Dietz v. Sutcliffe, 80 Ky. 650; Wood v. Garland, 58 N. H. 154, *semble*. An English *nisi prius* decision (De Symons v. Minchwinch, 1 Esp. 430) establishes the same rule, but it must be considered to be overruled by the cases cited in note 3, *ante*.

statute laws of those States which do not in express terms allow the creditor to attach before maturity of his debt, but provide generally that an attachment may issue where the debtor is about to abscond or is fraudulently disposing of his effects, yet do not require that the affidavit of the plaintiff shall affirmatively show that his claim is mature, in other words, whether in cases of fraud, it is not the intention of the statute, by dispensing with an affidavit that the plaintiff's claim is mature, to confer the right to attach whether the debt is mature or immature. There is no such thing as maintaining an attachment without a suit, for an attachment is but an incident of a suit, and if the suit falls the attachment must fall with it.[10] Hence it follows that if the intent and purpose of the attachment laws in such States is to give the right to attach before the maturity of the plaintiff's debt in cases of fraud, they must be construed to give the right in such cases to maintain *assumpsit* as a basis for the attachment. There would be no hardship to the debtor in such a construction; for a debtor who is absconding, or who is fraudulently putting his property beyond the reach of his creditors, is not entitled to any consideration. This is shown by the fact that the laws in most of the States expressly provide that in such cases his effects may be seized by the creditor, without regard to the expiration of the credit. It may be doubted whether the common law doctrine to which we have adverted should rule this question; for that doctrine applies only to the remedies of the creditor where the debtor fraudulently contracted the debt, whereas the attachment laws which we are considering, have no relation to the fraudulent inception of the debt, and are set in motion only by active measures on the part of the debtor to hinder, delay, and defraud his creditors by getting his property beyond the reach of the law. The procedure by attachment was unknown to the common law, and was intended to supply one of its chief inefficiencies. The purpose of that procedure is to frustrate and make abortive the fraudulent measures of the debtor, and if the debt be just, and nothing be wanting but the mere lapse of time to complete the common law right of action, the debtor would be permitted to frustrate the good intent of the statute by pleading the immaturity of the debt. Such a plea is at best merely dilatory—a plea in abatement—a plea for time in which to consummate the fraud. It may perhaps be objected to this view that the creditor has a remedy in equity by suit for injunction and the appointment of a receiver; but the Supreme Court of the United States has held that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even where there is a suit to establish it. The court said that only by means of a lien could a creditor acquire any vested or specific right in the property of the debtor, such as a court of equity could enforce; and while the claims of morality and justice, as well as the legitimate interests of creditors, required that there should be protection against the acts of a dishonest or insolvent debtor, yet that the legislature must determine upon the remedies appropriate to that end; and that in some of the States it had solved the difficulty by the enactment of bankrupt and insolvent laws, allowing the attachment and sequestration of the debtor's estate, the vacation of fraudulent conveyances, and the like.[11]

It may be contended that, however little the interests of the fraudulent debtor deserve to be respected in allowing an attachment upon an immature debt, the rights of creditors whose claims are mature should be considered, and that it is a fraud upon them to permit the attachment. It is not easy to perceive how the rights of junior creditors can stand upon any higher or stronger grounds than those of the debtor himself. In this connection we may refer to the case of Patrick v. Montader.[12] Here the action was begun and the attachment levied two days before the expiration of a 30 days' credit, on the ground that the debtor had procured the credit by fraudulent representations, and was about to fraudulently dispose of his estate. Judgment by default was entered for the plaintiffs, and other creditors filed a bill in equity to set the judgment aside, on the ground that the institution of the action before the expiration of the credit was a fraud upon their rights. The court refused to disturb the at-

[10] *Ex parte* Railway Co., 103 U. S. 794.

[11] Adler v. Fenton, 24 How. (U. S.) 407.

[12] 13 Cal. 434. See also Davis v. Eppinger, 18 Cal. 379.

tachment, holding that the debt was equitably due at the time the suit was begun. But even in a court of law, it is not clear that creditors should be allowed to intervene and set up a defense which the debtor declines to make.[13] The application should certainly be denied, where the defense proposed to be made is of that class which the law declares to be purely personal to the debtor. Judgments by confession have been held in some cases a violation of the law against preferential assignments;[14] but the writer is not aware of any case in which a mere judgment by default has been set aside as having that effect; nor of any case in which a junior attaching creditor has been permitted to come in and make a merely personal defense, such as infancy, or the statute of limitations, the statute of frauds, and the like, which the debtor does not choose to make. It is true that there are cases in which junior attaching creditors have been permitted to attack a prior attachment on the ground that it was founded on a false claim, or that the alleged debtor had fraudulently colluded with the plaintiff to evade the law against preferences, or to delay and defraud creditors;[15] but obviously these cases stand upon a different principle from those which deny the benefit of a personal defense to any person other than the debtor himself. There seems to be no good reason why the immaturity of the debt, if a defense at all in cases of fraud, should not be treated as strictly personal to the debtor. The reason of the rule which makes certain defenses purely personal seems to be, that the claim of the plaintiff is in fact equitable and just, and is only to be defeated by some legal objection which does not touch the merits of the case. The defense of nonmaturity of the plaintiff's claim comes fully within this reason, and the plaintiff should receive the protection of the rule. It scarcely needs to be said that an attachment will not be allowed in any case in which the liability of the defendant is merely contingent, such, for example, as the liability of a principal to his surety, where the surety has as yet paid nothing on account of the principal; or the liability of the drawer of a bill to the accommodation acceptor; or the liability of the maker of a note to an accommodation endorser.[16] The cases to which this article is addressed are those in which nothing other than the mere efflux of time is wanting to complete the right to sue at common law. We conclude, for the reasons given, that whatever may be the law as to the right of a creditor to maintain assumpsit without an attachment before the expiration of a fraudulently procured credit, it is the intent and purpose of the statutes giving a right to attach without requiring an affidavit that plaintiff's claim is mature, wherever the debtor is fraudulently disposing of his goods, or is about to abscond, to allow the attachment in such cases whether the credit has or has not expired; and that if the attachment in such cases be sustainable against the debtor himself, it must, *a fortiori*, be sustainable as against his other creditors, if any.

CHAPMAN W. MAUPIN.

[13] Bank v. Spurling, 7 Jones L. (N. C.) 398; Skinner v. Moore, 2 Dev. & Bat. (N. C.) 138; Harrison v. Pender, Busbee L. (N. C.) 78; Mann v. Child, 3 Mich. 531.

[14] White v. Kotzhausen, 129 U. S. 329; Dodge v. Strasburger, 21 Wash. Law Rep. (D. C.) 515.

[15] Drake on Attachments, 7th Ed. sec. 272.

[16] Black v. Schoharie, 3 How. (U. S.) 483, 510; Ellis v. Harmon, 104 Mo. 270; H. B. Claflin Co. v. Feibleman (La.), 10 South. Rep. 862; Henderson v. Thornton, 37 Miss. 448.

ELECTIONS — MAJORITY — AMENDMENT TO CONSTITUTION.

GREEN v. STATE BOARD OF CANVASSERS.

Supreme Court of Idaho, December 24, 1896.

Under the provisions of section 1, art. 20, Const. (providing for the amendment of the constitution), where a majority of the electors voting upon that question vote in favor of the amendment the same is ratified, although the votes thus cast are not a majority of the votes cast at the general election for State officers.

HUSTON, J.: The constitution of the State of Idaho contains the following provisions in regard to amendments of that instrument:

"Article 20. Amendments.

"Section 1. Any amendment or amendments to this constitution may be proposed in either branch of the legislature, and, if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals; and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the State at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each

county; and, if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

"Sec. 2. If two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately.

"Sec. 3. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and, if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members not less than double the number of the most numerous branch of the legislature.

"Sec. 4. Any constitution adopted by such convention shall have no validity until it has been submitted to, and adopted by, the people."

The legislative assembly of the State of Idaho, at its third session, submitted to the people, under said constitutional provisions, the following amendment of the constitution: "Shall section 2 of article 6 of the constitution of the State of Idaho be so amended as to extend to women the equal right of suffrage?" The vote as returned by the canvassing board upon said question was as follows: "For proposed amendment extending to women the equal right of suffrage: For, 12,126; against, 6,282." And upon this return said board declares said amendment not adopted; and petitioner brings her action for a review of the action of said board of canvassers in this behalf.

The only question submitted to us for decision is as to the construction to be given to the last paragraph of section 1 of article 20, above quoted: "And, if the majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution." The question presented is by no means a novel one. In fact, so able and experienced a jurist as Judge Thomas M. Cooley admits (Const. Lim., 6th Ed., p. 747, note 1) that "it must be confessed that it is impossible to harmonize the cases." An examination of the large number of authorities cited by counsel in the argument of this case accentuates the statement of Judge Cooley, and perhaps we shall not be obnoxious to the charge of evading a duty should we decline to enter upon a task which so eminent a jurist declares to be hopeless. We confess ourselves unable to appreciate the argument which would make the language of section 1 of article 20, and section 3 of said article synonymous or expressive of the same intention. If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise, are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words "majority of the electors," in section 1, should be construed to mean the same as the words "majority of all the electors voting at such election," in section 3. Even the authorities cited by counsel do not go to such an extent or sustain such a conclusion.

For us to go into an analysis of all the authorities cited and read upon the argument would accomplish nothing. We have carefully examined them all, in the light of the able arguments of counsel, and we find ourselves unable to base our conclusions upon any apparent weight of authority. We must decide this case upon the provisions of our constitution as the same appear to us, and, so doing, we are compelled to say that the construction contended for by the petitioner is the correct one. Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and, above all, upon a question of an amendment of the constitution; and it is equally difficult to ascertain the actual number of electors at any given time. To rely upon the vote cast upon some other question at the same election would be entirely unsatisfactory, and such aconstruction is, we think, at least impliedly negatived by the provisions of section 3. While it is true that some 10,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were—must have been—fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? We hold that the amendment under discussion is adopted, and has become a part of the constitution of the State of Idaho.

SULLIVAN, J., concurs.

MORGAN, C. J. (concurring): At the last general election in the State of Idaho, which occurred in November, the following question was submitted to the electors of the State, to-wit: "Shall sec-

tion 2 of article 6 of the constitution of the State of Idaho be so amended as to extend to women the equal right of suffrage?" The vote of the electors on the proposed amendment was as follows: For said amendment, 12,126; against said amendment, 6,282. The question submitted to this court is: "Under the provisions of the conconstitution and laws of this State, does this amendment become a part of the constitution?" No question of like importance has been submitted to this court during its existence. If decided in the affirmative, it nearly doubles the qualified voters of the State. It demands careful investigation and considerate judgment. It may not be improper, therefore, for me to give my reasons for concurrence in the judgment of this court.

The question of the policy or practicability of such a radical change in the fundamental law of the State, in regard to the qualification of electors, not being an issue in this cause, I do not propose to discuss. The proposition that the language of the constitution with reference to amendments thereto makes it practically impossible to secure any such I shall also dismiss, with the statement that it is not the province nor within the authority of this court to change or modify its provisions by judicial decision.

The provisions of our own constitution, and of others similar thereto, with reference to the votes necessary to carry any proposition, may be properly divided into three classes:

First. Those which require a majority or two-thirds of all the votes cast at a general or special election. Of this class is section 3 of article 8, regarding county and city indebtedness, which requires "two-thirds of the qualified electors thereof voting at an election to be held for that purpose;" that is, two-thirds of the qualified electors of such county or city. Also of the same class is section 1 of article 12, which provides "that cities and towns may become organized whenever a majority of the electors at a general election shall so determine." So is also section 3 of article 20, which provides that when it shall be deemed necessary to call a convention to revise or amend the constitution, which shall be called if a majority of all the electors voting at said election shall have voted for a convention, etc. The language of these sections is clear and unmistakable. It needs no construction, and it is only necessary to count the ballots cast at any such election and those voting for the proposition to ascertain if a majority of all those voting at said election were in favor of the proposition.

Of the class of cases cited in support of this proposition are St. Joseph Tp. v. Rogers, 16 Wall. 664, in which case the fourteenth section of the act required only a "majority of the legal voters of such township voting at such election." Of the same tenor is the case of People v. Warfield, 20 Ill. 165, in which it is held that the phrase "majority of the voters of a county" is held to mean a majority of those voting at the election. Also, People v. Garner, 47 Ill. 246; People v. Wiant, 48 Ill. 263; Cass Co. v. Johnston, 95 U. S. 360; State v. Linn Co. Court, 44 Mo. 504; State v. Renick, 37 Mo. 270. From this class of cases we have, perhaps, sufficiently quoted. They differ from the language of our constitution in the particular under discussion in this: that in those cases the law or constitution, as the case may be, positively and in terms requires a majority or two-thirds of all the voters of a particular district or of the State, while our constitution requires a majority of the electors. They are not in point except as giving the reasons for the decisions, which differ somewhat in the different cases. In some cases the reason given is that it is a practical impossibility to ascertain how many legal voters there may be at the time of the election in any given city, county, or State. This reason applies with equal force in the case at bar. There is no necessity for qualifying the word. It is impossible to ascertain how many voters there are in the State at any election. There may be many voters in the State who did not vote for governor, for instance, who did not vote for the presidential electors; and there may have been many voters who voted for attorney general, who voted neither for governor nor presidential electors. The impossibility of the task is apparent at once. But, say the defendants, this is what the constitution requires, and, if it means anything except a majority of the electors voting upon the proposition, the former is what it does mean. However, they say this provision is satisfied by considering the number voting at this election, as the whole number of electors. But we know this is not true, and we have no warrant for such construction, either in the words of the particular section, the context, or in reason.

The second class of cases are those which require a majority of all the qualified voters of a particular district, county, city, or of the qualified voters of the State. This provision would seem to be too plain to need any construction, or to lead to any difference of opinion. The courts, however, in quite a number of cases, have construed this provision to be satisfied by a majority of the votes cast upon the proposition, while others have construed it according to the strict letter of the constitution or law, as the case may be. Of the latter class are the following cases, cited by counsel for defendants, to-wit: State v. Brassfield, 67 Mo. 331 (in which case the constitution of Missouri states that a county, city, or town shall not be authorized to become a stockholder, etc., unless two-thirds of the qualified voters of such county, city, or town, etc.); Hawkins v. Board, 50 Miss. 735. The same provision is in the constitution of Mississppi (article 12, § 14). Cocke v. Gooch, 5 Heisk. 310. "No part of a county shall be taken off without the consent of two-thirds of the qualified voters in such part." Const. Tenn. art. 10, § 4; Duke v. Brown, 96 N. C. 127, 1 S. E. Rep. 873. Same provision in the constitution of North Carolina (article 7, § 7).

These decisions are not in point, for the provisions in the various constitutions are all of the second class, as quoted above, and are radically different from our own provision in section 1, art. 20. The decisions are instructive, however, as indicating the trend of the opinions held by the various courts of the country upon this subject. Of precisely the same tenor is the constitution of Illinois, as quoted in People v. Brown, 11 Ill. 478. Also statute of Illinois, as construed in Chestnutwood v. Hood, 68 Ill. 132. It required a "majority of all the legal voters of the county." In People v. Town of Berkeley, 102 Cal. 298, 36 Pac. Rep. 591, also, the constitution required, in terms, a "majority of the electors voting at a general election." It would manifestly be a bootless, and certainly a very monotonous, undertaking, to follow through all the decisions upon a precisely similar provision of statutes and constitutions. They are substantially the same.

The third class are those which require a majority vote in the affirmative, without the specifications attached to the other classes. In this class the term "plurality of votes" is spoken of as being sufficient or insufficient to adopt a constitutional amendment, both in brief of defendant and in some of the decisions of the courts. The term must have been used inadvertently, as there can be no plurality of votes unless there are three or more candidates, or three ways of voting upon a proposition, as a plurality is the number of votes received by one candidate, in excess of those received by either one of two or more other candidates, and not a majority over both. There can be no plurality where there are but two candidates, or but two ways of voting on a proposition, as upon a constitutional amendment. Section 2 of article 18 of the constitution of Idaho requires two-thirds of the qualified electors of a county, voting on the proposition at a general election in favor of removal, to remove a county seat. Section 3 of article 18, relating to the division of counties, requires a majority of the qualified electors of the territory proposed to be cut off voting on the proposition at a general election to divide a county. Section 3 of article 20 (the next section of the same article), in which is the provision under discussion, requires, in order to call a convention to revise or amend the constitution, that "a majority of all the electors voting at said election, shall have voted for such convention, at the next general election." Evidently, it was not the intention of the framers of the constitution to require either one of these conditions to secure an amendment to the constitution. If it had been, they would have so expressed it, and at a time when the different methods of making the constitution were fresh in their minds; but they did not do so, and therefore we must conclude they did not intend it. It may be said, however, that, if they had intended that only the votes cast for and against this amendment should be considered, they would have so expressed it, as in section 9 of article 7, in section 1 of article 8, and section 2 of article 10. While they have not used the same words in sections 1 and 2 of article 20, we contend they have substantially said so. Section 2 of article 20 provides that, "if two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately." Here is a positive direction that the elector shall vote either for or against the proposition. This is followed by the statute, section 57, p. 75, 1 Sess. Laws Idaho, providing that, when the question of a constitutional amendment is to be submitted to the people, a space of half an inch shall be left opposite the words "Yes" and "No," printed upon the ballot, on which the voter is to make a cross opposite the answer he desires to make. This was followed by an amended section 57, p. 95, 3 Sess. Laws Idaho, in which it is provided that a circle half an inch in diameter shall be made opposite the words "Yes" and "No," when the same or a similar question is to be submitted, in which the voter is to make a cross opposite the answer he desires to make.

In Senate Joint Resolution No. 2, approved January 21, 1895, the same legislature provided that the following question shall be submitted to the electors of the State: "Shall section 2 of article 6 of the constitution be so amended as to extend to women the equal right of suffrage?" In accordance with the constitution and the statute, the question was submitted with the words "Yes" and "No" printed in separate spaces, with a circle of the required size opposite each, in one of which each voter who desired to express an opinion on the question was required to make a cross. Why should the constitution and two different legislatures provide that those who desired to vote against the proposition should make a cross opposite the word "No" if these votes were not to be counted, and why should they be counted if all those who did not vote at all were to be counted as having voted "No?" There is no answer. The constitution and the statutes say: "All you electors who believe that equal right of suffrage should be extended to women stand up, and be counted," 12,126 voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: "All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted." 6,282 stand up and are counted. 18,408 votes in all cast upon the question. But, say the defendants, there were about 10,000 qualified voters in the State who did not vote at all on the question, that should be counted as having voted "No." Why should they be counted in the negative? "The constitution does not require it, neither do the statutes. These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject? There is absolutely no reason, unless

the constitution or the statutes require it, and we have seen they do not.

The Supreme Court of Maryland, in Walker v. Oswald, 11 Atl. Rep. 711, in construing an act of submission of the question of high license to the voters of a county, wherein it is provided that the act shall take effect if a majority of the voters of said county shall determine by their ballots in its favor, holds that those voters absenting themselves, and those who, being present, abstain from voting, are considered as having acquiesced in the result, and that the measure is adopted if it receives a majority of those voting upon it, even though it fail to receive a majority of the votes cast upon some other subject. Cass Co. v. Johnston, 95 U. S. 369. The Supreme Court of Minnesota, in Dayton v. City of St. Paul, 22 Minn. 400, construes the following provision of the constitution of the State: "And if it shall appear in a manner provided by law that a majority of the voters present and voting shall have ratified such alterations or amendments, the same shall be valid to all intents and purposes as a part of the constitution." The court declares that "the amendment is ratified if it receives a majority of all the votes upon it, although not a majority of the votes cast at the election." The court says further that "it is the general rule in affairs of government that an election or a voting, whenever called for, is to be determined by the votes of those who vote to fill the office which is to be filled, or for or against the proposition which is to be adopted or rejected, and not by counting on either side those who do not vote at all." And this, in my opinion, is the true rule, as those who express no opinion should not be counted as having expressed any on either side. This is a government by the people who have opinions, and are willing to express them. Representatives are elected both in congress and the legislature. Officers are elected, constitutions are framed, and laws enacted, and, of right, ought to be, by these men, and by these only. See, also, Taylor v. Taylor, 10 Minn. 107 (Gil. 81). In State v. Barnes (N. D.), 55 N. W. Rep. 883, the court says: "Congress passed an enabling act permitting North Dakota to call a convention, formulate a constitution, submit it to the people, at the same time submit separate articles which required for their adoption a majority of the legal votes cast." The supreme court held that an article which was submitted under this clause, and received a majority of the votes cast upon this question, was adopted, although it did not receive a majority of the votes cast for governor. The language is much stronger than in the case at bar. In People v. Clute, 50 N. Y. 461, the court says: "It is the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office. Those who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and do not vote for any candidate for an office (that express no opinion), are bound by the result of the action of those who do; and he who receives the highest number of earnest, valid ballots is the one chosen to the office." The Supreme Court of Kansas, in Board v. Winkley, 29 Kan. 36, says that "at a general election for county or township officers, if a majority of the votes cast are for a bounty for the growing of hedges, the county commissioners shall declare the law to be in full force and effect." Held that, if a majority of the votes cast upon that question are for the proposition, it is legally adopted, notwithstanding it failed to receive a majority of all the votes cast at the election for township officers. In the case of St. Joseph Tp. v. Rogers, *supra*, the thirteenth section of the act then under consideration provided that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of the proposition, then, etc. It will be noticed that this language is much stronger than the language under discussion in this cause; as in section 1, art. 20, Const., the language is that, if a majority of the electors shall ratify the same, it shall become a part of the constitution, etc.; and in the above cause (St. Joseph Tp. v. Rogers) the court hold that a majority of the legal voters of the township voting at the election was sufficient to authorize the subscription, although all the voters voting on both sides were together but a minority of all the legal voters of the township. In People v. Warfield, 20 Ill. 165, the court further says: "If we go beyond this, and inquire whether there are other voters of the county who were detained from the election by absence or sickness, or voluntarily absented themselves from the polls, we should introduce an interminable inquiry, and invite contest in elections of the most harassing and baneful character, if we did not destroy all the practical benefits of laws passed under those provisions of the constitution."

Here, then, are a number of decisions which declare that, when a constitution or statute declares that a proposition requires a majority or two-thirds of all the voters of a given locality, such provision is satisfied if the proposition receives a majority or two-thirds, as the case may be, of all those voting, taking no account whatever of those, be the number large or small, who fail to vote. It is admitted that if a special election was authorized and held on this question, and it appeared that 3,000 votes or a less number were cast for the proposition, and 1,500 against it, it would be legally adopted. This a distinction without a difference, as in this case the amendment is voted on separately, precisely the same as it would be if no other question was presented, or no officers were to be elected, and the vote taken and reported to the canvassers separately in the same way it would have been had this been the only question before the electors for their decision.

To recapitulate, then: Neither the constitution nor the statutes require either a majority of all the qualified voters of the State, or a majority of all the votes cast at the election. It is clear that the decided weight of authority in such cases is that the proposition is decided in the affirmative if it receives a majority of all the votes cast upon the question. By many of the courts it is considered that those who absent themselves from the polls, or, being present, do not vote upon the question, assent to the will of the majority who do vote upon the question. By this court it is held that those who have no opinion on the subject, or none that they care to express, not having voted on either side of the question, should not be counted upon either side. As to this question they are not qualified voters.

For the reasons stated, I concur with opinion expressed by Mr. Justice Huston.

NOTE.—*The Nature of the Majority Required in Favor of Questions Submitted to a Popular Vote.*—The cases upon this subject may be divided into the following classes: I. Those which depend upon general rules of law, unaffected by statutory or constitutional provisions. II. Those which depend upon the peculiar language of the statute or constitution under which the election was held. As to the first class of cases the following rule may be stated: Wherever a question is submitted to the decision or action of a majority of voters, the meaning of the submission is the decision or action of a majority of those qualified to vote, and who in fact vote upon the question or proposition submitted, unless some different intention is clearly expressed in the act or instrument providing for the submission. The presumption is that the qualified voters who do not exercise their privilege of voting, assent to the expressed will of the majority of those voting. Cooley Const. Lim. (6th ed.), 779 (5th ed.) 74*n*; Ang. & Ames Corp. (9th ed.), §§ 129, 501; Dillon Mun. Corp. (4th ed.), § 277; 1 Beach on Public Corporations, § 386; Rex v. Foxcroft, 2 Burr. 1017; Craig v. First Presb. Church, 88 Pa. St. 42; Rex v. Miller, 6 Term Rep. 268; People v. Clute, 50 N. Y. 451. The second class of cases, or those which depend upon the peculiar language of the statute or constitution under which the election was held, may be subdivided as follows: (1) Cases in which but one question was submitted at the election, and it was held that a majority of all who voted upon that question, was sufficient, though not a majority of all entitled to vote upon the question. From these cases the following rules may be formulated: Where the legislature has provided an election as the means of ascertaining the wishes of the electors of a municipality upon a question, and this question is the only one to be submitted to a vote, and has made no provision for a registration, and has designated no other list or roll as the evidence of the number of electors, a majority of the votes actually cast, will determine that question Southworth v. Railroad Co., 2 Mich. 287 (1851); Railroad Co. v. Davidson Co., 1 Sneed, 636 (1864); People v. Warfield, 20 Ill. 159 (1858); Taylor v. Taylor, 10 Minn. 107 (1865); State v. Binder, 38 Mo. 450 (1866); State v. Mayor, 37 Mo. 270 (1866); State v. Linn Co., 44 Mo. 504 (1869); Dunnovan v. Green, 57 Ill. 63 (1870); Sanford v. Prontice, 28 Wis. 358 (1870); People v. Town of Harp, 67 Ill. 62 (1873); Reiger v. Commrs., 70 N. C. 319 (1874); Black v. Cohen, 52 Ga. 621 (1874); Mayor v. Inman, 57 Ga. 370 (1876); County Seat of Linn Co., 15 Kan. 500 (1875); Carriger v. Mayor, 1 Lea, 243 (1878); Vana v. Austill, 45 Ark. 400 (1885); Mobile Sav. Bank v. Supervisors, 24 Fed. Rep. 110 (1885); Yesler v. Seattle, 1 Wash. 310 (1890); Madison Co. v. Priestly, 42 Fed. Rep. 817 (1890); Smith v. Proctor, 130 N. Y. 319 (1891); Metcalfe v. Seattle, 1 Wash. 297 (1890); State v. Snodgrass, 1 Wash. 305 (1890); Day v. City of Austin, 22 S. W. Rep. 757 (1893).

Registration books, or the vote at the last general, election, cannot, unless otherwise provided by the legislature, be resorted to for the purpose of ascertaining what proportion of the qualified voters in the municipality have voted. The presumption is that those who actually voted constituted the entire body of qualified voters. People v. Garner, 47 Ill. 246; Melvin v. Lisenby, 72 Ill. 63; Carroll Co. v. Smith, 111 U. S. The intention of the legislature to depart from the general rule that a majority of those actually voting upon the question submitted, is sufficient, must be clearly and distinctly manifested upon the face of the statute. McCrary on Elections; Reiger v. Commrs., 70 N. C. 319; Dayton v. City of St. Paul, 22 Minn. 400; City of South Bend v. Lewis, 138 Ind. 512. The rule that the submission of a question to a majority of the qualified voters of a municipality, means a majority of those who actually vote, and not a majority of those entitled to vote, is firmly established in the Supreme Court of the United States. St. Joseph Township v. Rogers, 16 Wall. 644; Cass County v. Johnson, 95 U. S. 560; overruling Harshman v. Bates County, 92 U. S. 569; Douglass v. Pike County, 101 U. S. 677; Carroll County v. Smith, 111 U. S. 556; Knox County v. Ninth Nat. Bank, 147 U. S. 91. In the following cases the submission of a question to a majority of the qualified voters of a municipality, has been held to mean a majority of those entitled to vote, and not merely a majority of those actually voting. State v. Winkelmeier, 35 Mo. 103; State v. Brassfield, 67 Mo. 331; Webb v. Lafayette Co., 67 Mo. 353; Ranney v. Balder, 67 Mo. 476; State v. Harris, 96 Mo. 29; Chester, etc. R. Co. v. Caldwell Co., 72 N. C. 486; Duke v. Brown, 96 N. C. 127; Sutherland v. Goldsboro, 96 N. C. 49; McDowell v. Construction Co., 96 N. C. 514; Markham v. Manning, 96 N. C. 132; Wood v. Oxford, 97 N. C. 227; Alexander v. People, 7 Colo. 155; People v. Brown, 11 Ill. 478; Oustoll v. People, 123 Ill. 489; Slingerland v. Norton, 61 N. W. Rep. 322; State v. Larrabee, 55 N. W. Rep. 883; Cocke v. Gooch, 5 Heisk (Tenn.), 294; Bouldin v. Lockhart, 3 Baxt. (Tenn.) 262; Bradin v. Stumph, 16 Lea (Tenn.), 581; Fortworth v. Davis, 57 Tex. 225; People v. Chapman, 67 Ill. 137; People v. Trustees, 70 N. Y. 28; State v. Labaw, 32 N. J. L. 269; Wilson v. Florence, 39 S. C. 397; Mayor v. Wilson, 96 Ga. 251; Mayor v. Wade, 88 Ga. 251; Garvin v. Atlanta, 86 Ga. 132.

(2) Cases in which two or more questions were submitted at the same election, and in which it was held that a majority of all who voted on the particular question in controversy was sufficient, though not a majority of all who actually voted at the election. Gillespie v. Palmer, 20 Wis. 572 (1866); Dayton v. City of St. Paul, 22 Minn. 400 (1876); Commrs. v. Winkley, 29 Kan. 36 (1882); Walker v. Oswald, 68 Md. 146 (1887); State v. Echols, 41 Kan. 1 (1889); Armour v. Commrs., 41 Fed. Rep. 321 (1890); State v. Grace, 20 Oreg. 154 (1890); State v. Langlie, (N, D.), 67 N. W. Rep. (1896) 958. Cases in which it was held that a majority of all who vote at a general election, and not merely a majority of those voting on a particular question at that election is required, and in which the decision turned upon the peculiar language of the provision under which the election was held. State

v. Roper, 46 Neb. 729; State v. Babcock, 17 Neb. 188; State v. Anderson, 42 N. W. Rep. 422; People v. Town of Bulkley, 102 Colo. 298; State v. Swift, 69 Ind. 505; Portland etc. R. Co. v. Standish, 65 Me. 63; State v. Lancaster Co., 6 Neb. 474; State v. Mayor of St. Louis, 73 Mo. 435; People v. Wiant, 48 Ill. 264; Chestnutwood v. Hood, 68 Ill. 132; State v. Sutterfield, 54 Mo. 391; Enyart v. Township, 25 Ohio St. 618; State v. Foraker, 46 Ohio St. 678; Stebbins v. Judge (Mich.), 1 66 N. W. Rep. 594; Bayard v. Klinge, 16 Minn. 249; Everitt v. Smith, 22 Minn. 53.

JETSAM AND FLOTSAM.

MR. BEACH AND HIS PUBLISHER.

The *Albany Law Journal* has received from Messrs. Baker, Voorhis & Co., of New York, a copy of a printed circular, in which they make reply to the statements put forth by Mr. Charles F. Beach, Jr., recently in reference to the publication of a certain lawbook by the firm mentioned, and upon which this journal, in a recent issue, made a few good-natured remarks. Messrs. Baker, Voorhis & Co. rightly assume that we had no intention to do injustice to them. The substance of Mr. Beach's statements was given for what it was worth, without any endorsement of the same, or in any way attempting to justify his course of action. Our intention was merely to show the position which Mr. Beach had taken in reference to the publication of what he saw fit to term a spurious and bastard edition of his work. In their circular, Messrs. Baker, Voorhis & Co. make certain statements, which are calculated to exhibit Mr. Beach in an unfavorable light before the public. This journal does not propose to detail these charges, relating, as they do, to merely private business transactions between publishers and author, in which the public have little, if any, concern; but, in the interest of fairness, we are quite willing to add that nothing heretofore printed in these columns was intended to detract from the well-known reputation of this firm for honorable and fair dealing, as well with authors as with the public.—*Albany Law Journal.*

[Inasmuch as the article, for the publication of which the *Albany Law Journal* thus disavows any wrongful intention, thereafter appeared in the Jetsam and Flotsam column of this JOURNAL we have thought it fair to insert the above explanation of the *Albany*, coupled with our assurance that in its republication we had no idea of taking any side in this controversy. We have received and read the circular issued by Baker, Voorhis & Co. pertaining to their contention with Mr. Beach, and are free to say that a very strong case is made by them. Without entering into the controversy, it pleases us to say that the law book house of Baker, Voorhis & Co. is the oldest in the United States, and that their reputation for business integrity and fair dealing is so well known that it would require more than ordinary evidence to persuade us that they would be guilty of intentional wrong. —Editor.]

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION — Administrator's Sale.—An administrator's sale to pay debts, though void for uncertainty of description in the application, order, report, and confirmation of sale, was not tortious, and hence the purchaser who canceled a debt due from the estate in consideration of the transfer to him was entitled to a lien on all the lands of deceased for the return of the price.—MACMANUS V. ORKNEY, Tex., 39 S. W. Rep. 614.

2. ADMINISTRATION—Setting Aside Sale.—While the purchase by an administrator of land of his intestate sold by him will be set aside in equity, yet, when the sale was legally conducted, it passes the legal title, and will only be set aside at suit of some one having an equitable right in the property, and on condition of repayment of the purchase money, when the sale has been confirmed and the price paid.—HIGHSMITH V. WHITEHURST, N. Car., 26 S. E. Rep. 917.

3. APPEAL—Second Appeal—Law of the Case.—Where, on appeal from a judgment in ejectment, counsel for respondent relied on the statute of limitations as prescribed by Code, § 2939, a statement in the opinion of the court that there was no other limitation in force at the time will not prevent, on a second trial, a defense under the limitation law of 1877, which statute was not considered in the original hearing on appeal.—WARD V. HUGGINS, Wash., 48 Pac. Rep. 240.

4. APPEAL BOND—Joint Judgment.—Where one of the defendants executes an individual appeal bond, and attempts to prosecute an appeal alone, the dismissal thereof, on the ground that the judgment and the order granting the appeal were joint, fixes the liability of his surety.—CRESWELL V. HERR, Colo., 48 Pac. Rep. 155.

5. ARREST—Necessity for Warrant.—The statute allowing any person, without a warrant, to arrest one

who commits a felony in his presence and within his view, does not authorize such arrest by one who was near enough to have seen the accused at the time of an alleged shooting, but did not see him.—RUSSELL v. STATE, Tex., 39 S. W. Rep. 674.

6. ASSIGNMENT FOR CREDITORS — Corporations.—An insolvent corporation may make a general assignment for the benefit of its creditors either by the directors or under their authority.—BIRMINGHAM DRUG CO. v. FREEMAN, Tex., 39 S. W.Rep. 626.

7. ATTACHMENT — Claim of Exemption.—*Prima facie* all personal property is subject to sale for the payment of a judgment, and a defendant cannot be allowed exemptions, unless they are claimed as provided by statute.—SCANLAN v. GUILING, Ark., 39 S. W. Rep. 713.

8. ATTORNEYS — Liability to License Taxes.—Attorneys at law are subject to the license tax for practicing their professions imposed by municipal authorities and by the State. The license authorizing them in the first instance to pursue their profession is an evidence of character and capacity, and carries with it no exemption from taxation by license tax. The profession has no special privilege from that of other occupations.—STATE v. FERNADEZ, La., 21 South. Rep. 591.

9. ATTORNEYS — Removal from Office.—Pub. St. ch. 159, § 39, declaring that an attorney may be removed for any deceit, malpractice, or other gross misconduct does not take away jurisdiction at common law to remove an attorney for causes not included in the statute.—BAR ASSOCIATION OF CITY OF BOSTON v. GREENHOOD, Mass., 46 N. E. Rep. 568.

10. BENEVOLENT SOCIETY—Insurance.—A person insured in a benefit association can charge his beneficiary with payment of a debt out of the insurance money.—WOODRUFF v. TILMAN, Mich., 70 N. W. Rep. 420.

11. BENEVOLENT SOCIETY — Insurance — Suicide.—A regulation against suicide, made by the board of control of the Knights of Pythias, which is a mere subordinate administrative body, but not enacted or ratified by the supreme lodge, which, under the charter, has the sole legislative power, cannot be sustained as a by-law. — SUPREME LODGE KNIGHTS OF PYTHIAS v. STEIN, Miss., 21 South. Rep. 559.

12. BILLS AND NOTES — Consideration — Duress.—Promissory notes are executed upon sufficient consideration which are given to a woman in consideration of her written release of one who is a son of one of the makers, and brother of another, from all claims for damages which she might have received by reason of his breach of promise to marry her, although he is not a party to the notes, and they were given without any authority from him.—BARRETT v. MAHNKEN, Wyo., 48 Pac. Rep. 202.

13. BILLS AND NOTES—Execution.—The execution of a note includes its delivery, and therefore a denial by a surety of the authority of the maker to deliver the note without the signature of a co-surety is, in substance, a plea of *non est factum*.—LOMAX v. FIRST NAT. BANK OF HASKELL, Tex., 39 S. W. Rep. 655.

14. BILLS AND NOTES—Extension of Note—Consideration.—An agreement to extend a note is based on a sufficient consideration where it provides for its indorsement by a third party.—MERCHANTS' BANK OF PORT TOWNSEND v. BUSSELL, Wash., 48 Pac. Rep. 242.

15. BILLS AND NOTES—Indorsement.—A contract indorsed upon the back of a promissory note, as follows: "For value received, I hereby assign and transfer the within bond and coupons thereto annexed, with all my interest in and rights under the mortgage securing the same, to Laura A. Gilbert, without recourse," —and signed by the payee,—is not a commercial indorsement; and the note and mortgage in the hands of the assignee is a chose in action, subject to the same defenses that it would have been in an action by the payee.—GILBERT v. NELSON, Kan., 48 Pac. Rep. 207.

16. BILLS AND NOTES—Non-negotiable Note.—A note containing this provision: "And if default be made in the payment of any interest note, or any portion thereof, after the same becomes due and payable, then said principal note shall, at the option of the legal holder thereof, become at once due and payable without further notice, and be collectible as stipulated in the mortgage to secure this,"—is not negotiable paper.—WARREN v. GRUWELL, Kan., 48 Pac. Rep. 205.

17. BILLS AND NOTES—Protest.—The payee of a note given for the price of land, who indorses it in blank, waives protest, where, in the same transaction, he assigns by separate instrument his lien as vendor, and therein waives protest of the note.—ROBERTSON v. PARRISH, Tex., 39 S. W. Rep. 646.

18. BONA FIDE PURCHASER—Subsequent Mortgagee.—One who takes a real-estate mortgage to secure a pre-existing debt actually and justly owing to him, without notice, actual or constructive, of the existence of an outstanding unrecorded mortgage against such real estate, in a subsequent purchaser in good faith, within the meaning of section 16, ch. 73, Comp. St.—DORR v. MEYER, Neb., 70 N. W. Rep. 543.

19. BUILDING AND LOAN ASSOCIATION—Insolvency—Payment of Premiums and Dues.—The insolvency and dissolution of a building association render its mortgages enforceable at once by the receiver, regardless of their terms of payment, for the purpose of winding up the affairs of the association, as to all mortgagees who are parties to the receivership proceedings. On the insolvency and forced dissolution of a building association, premiums or bonuses in addition to interest on the loans and dues on the stock, paid by borrowers prior to the dissolution, should be credited as payments on their debts to the association, though the mortgages securing such debts expressly provide that the premiums should belong to the association.—CURTIS v. GRANITE STATE PROVIDENT ASSN., Conn., 36 Atl. Rep. 1023.

20. BUIDING AND LOAN ASSOCIATIONS—Mortgages.—Under a building association's loan contract providing that if the trust deed securing the loan should be "foreclosed by action in court" an attorney's fee should be allowed, the fee is allowable on foreclosure under a petition in reconvention filed in a suit by the borrower to enjoin a sale under a power in the trust deed, where the injunction was asked on the untenable ground that the land was a homestead, though the association had proposed to sell under the power for a greater sum than was due.—BUILDING & LOAN ASSN. OF DAKOTA v. GRIFFIN, Tex., 39 S. W. Rep. 656.

21. BUILDING ASSOCIATIONS—Contract—Usury.—The contract by which a party becomes the owner of shares of the stock of a building and loan association, to be paid for in installments running through a long series of years and borrows from the association on his stock, the interest on the loan being 6 per cent. per annum, is not to be treated as a usurious loan, the payments supposed to constitute the usury, by the terms of the contract, being made on the stock debt, not the loan.—RICHARD v. SOUTHWESTERN BUILDING & LOAN ASSN., La., 21 South. Rep. 643.

22. CARRIERS—Liability Beyond Line.—A carrier receiving goods for shipment to a point off its own line is not, in the face of an express provision in the contract to the contrary, liable for damages beyond its own line.—LOUISVILLE & N. R. CO. v. TARTER, Ky., 39 S. W. Rep. 698.

23. CARRIERS—Negligence.—It is not such negligence for a passenger to stand upon the platform of a crowded street car, while in motion, as will *per se* defeat a recovery for injuries received in consequence of the negligence of the persons in charge thereof.—EAST OMAHA ST. R. CO. v. GODOLA, Neb., 70 N. W. Rep 491.

24. CARRIERS—Passenger—Contributory Negligence —Where a train was stopped before reaching a wrecked tank containing burning oil, and a safe place

was designated for passengers until another train could be brought upon the other side of the wreck, a passenger who voluntarily went nearer to the tank, and was injured by its explosion, cannot recover damages.—CONROY v. CHICAGO, ST. P., M. & O. RY. CO. Wis., 70 N. W. Rep. 486.

25. CARRIERS—Passengers—Trespassers.—A railroad company is liable to a trespasser for willful and unnecessary injury of him by the conductor acting within the scope of his authority.—BALTIMORE & O. R. CO. v. NORRIS, Ind., 46 N. E. Rep. 554.

26. CARRIERS OF GOODS — Limitation of Liability.—A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this State, though valid in the State where made, when such attempted restriction of liability is illegal, and contrary to the public policy of this State.—CHICAGO, B. & Q. R. CO. v. GARDINER, Neb., 70 N. W. Rep. 508.

27. CARRIERS OF PASSENGERS — Lease of Trains.—Where an association makes a contract with a railroad company for a certain consideration to transport excursionists over its road and another road for the benefit of both companies, both sharing equally in the profits, both companies are jointly and severally liable for damages occasioned by the neglect of either in the performance of duty imposed by law on carriers of passengers.—COLLINS v. TEXAS & P. RY. CO., Tex., 39 S. W. Rep. 643.

28. CHATTEL MORTGAGE — Time of taking Effect. — A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the directions of the mortgagor, it was filed for record, and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery, but not so as to persons who have acquired title to, an interest in, or a lien upon, the property, before the actual acceptance by the mortgagee.—ROGERS v. HEADS IRON FOUNDRY, Neb., 70 N. W. Rep. 527.

29. CONSTITUTIONAL LAW — County Bonds. — Const. art. 11, § 7, provides that no county shall incur a debt "unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay" interest and create a sinking fund: Held, that where a statute authorizing the issuance of county bonds required the commissioners' court to levy a sufficient tax, their failure to perform that duty did not invalidate the bonds.—MITCHELL COUNTY v. CITY NAT. BANK OF PADUCAH, KY., Tex., 39 S. W. Rep. 628.

30. CONTRACTS. — Where there is no evidence to support a verdict, a new trial will be granted. Where plaintiff and defendant orally agree upon the terms of a contract, and it is afterwards reduced to writing, and signed by plaintiff, and the written contract is then forwarded to defendant to sign, who, before affixing his signature to the instrument, inserts therein stipulations limiting his liability, and subsequently delivers such written contract to the plaintiff, the stipulations so inserted are valid and binding in any action instituted by the plaintiff to recover for a breach of the written contract. — BUCKI v. SEITZ, Fla., 21 South. Rep. 576.

31. CONTRACT — Agreement to Assume. — Where the organizers of a corporation to deal in real estate took in as a member one who had contracted for the purchase of certain property, who thereafter became active in the affairs of the company, and the property was conveyed to the corporation under an agreement that it should assume the contract made by the original purchaser, the corporation is bound by the contract as actually made with the vendor, though the true consideration for the purchase was not stated in the deed. — STEWART v. NORMAN, Tenn., 39 S. W. Rep. 758.

32. CONTRACTS—Breach — Damages.—A contractor is responsible for the damages resulting in consequence of his failure to complete the work on time.—ELLERBE v. MINOR, La., 21 South. Rep. 583.

33. CONTRACTS—Illegality.—Allegations that plaintiff was employed by defendants to sell railroad ties, and that he sold them to a certain company, were sustained by proof that the ties were sold under bids by defendants and contracts awarded them thereon, where it was known to both plaintiff and defendants, when they made the agreement, that the contracts for the purchase of ties would be let on competitive bidding.—MCDEARMOTT v. SEDGWICK, Mo., 39 S. W. Rep. 776.

34. CONTRACTS — Interpretation — Performance.—An agreement that, if S did not make certain payments, defendant might make them, and deduct from capital stock in escrow enough to equal in cash value the payments, gives defendant title to stock deducted pursuant thereto, and therefore a judgment that defendant turn over the stock to a creditor of S on reimbursement by the creditor for the payments made is erroneous.—PABST BREWING CO. v. MONTANA BREWING CO., Mont., 48 Pac. Rep. 234.

35. CONTRACT — Liability of Agent. — Where an agent contracts with a third person in his own name, and does not disclose his principal, he is personally liable on the contract. — PORTER v. MERRILL, Mo., 39 S. W. Rep. 798.

36. CONTRACTS — License — Unpatented Device.—The inventor of an unpatented device may make a valid contract for its manufacture, use, or sale, where the parties understand that no patent has been issued, and the contract is made with reference to that fact.—HAMILTON v. PARK & MCKAY CO., Mich., 70 N. W. Rep. 486.

37. CONTRACTS — Offer and Acceptance.— An offer by defendants to let cattle space in a steamship, subject to prompt reply, was wired at 11:30 a. m., and received by plaintiff at 12:16 p. m. At 12:28 p. m. plaintiff telegraphed an acceptance, which did not reach defendants till 1:20 p. m., and in the meantime, at 1 p. m., the latter wired a revocation, which plaintiff received at 1:43 p. m.: Held, that defendants were bound.—BRAUER v. SHAW, Mass., 46 N. E. Rep. 617.

38. CONTRACT—Pleading.—A complaint which alleged the dissolution of a partnership between plaintiff and defendant, and that plaintiff was to turn over all the firm property in consideration of the discharge of a firm note by defendant, and that plaintiff had so turned over the property, and that defendant had failed to pay said note, and that plaintiff was compelled so to do, is sufficient in an action for damages on the contract, without an allegation of performance by plaintiff of the provision in the contract that he should pay the other debts of the firm, and should pay defendant a certain sum of money. — ROMEL v. ALEXANDER, Ind., 46 N. E. Rep. 595.

39. CONTRACT — Reformation — Mistake.—A contract will be reformed where the parties agreed on certain modifications, and one of them read a list of the agreed changes, while a third person undertook to make the proper erasures in the proposed contract, but did not do so correctly, and the parties signed the contract as changed, without reading it.—WEST v. SUDA, Conn., 36 Atl. Rep. 1015.

40. CORPORATIONS — Contracts by Officers.—The doctrine that the knowledge of a corporate officer is imputable to the corporation does not apply to work performed on the corporate property under a contract with a director in his individual capacity, and with the understanding that he shall be personally liable.—AYERS v. GREEN GOLD MIN. CO., Cal., 48 Pac. Rep. 221.

41. CORPORATIONS — Existence. — Where the charter of a proposed corporation was properly filed, and the capital stock was to belong in agreed amounts to the owners, and also another, of the property turned over to the company, actual issuance of stock was not essential to corporate existence. — HAMILTON v. JAMES A. CUSHMAN MANUFG. CO., Tex., 39 S. W. Rep. 641.

42. CORPORATION—Insolvent Corporation.—Where it appears that assets of a corporation were allowed by

its directors to be sold under mortgages in order that they might be transferred by the nominal purchaser to a new corporation organized by the same directors, for the purpose of saving the assets from liability for other debts, and that the assets were largely in excess of the mortgages on them, equity will follow this excess and compel its application to the debts of the old corporation.—GODDARD v. FISHL-SCHLICHTEN IMPORTING CO., Colo., 48 Pac. Rep. 279.

43. CORPORATIONS—Powers — Injunction.—A court of equity does not possess the power to restrain a corporation organized under the forms of law from performing acts within its corporate power, merely because some of the steps taken in organizing the company may have been irregular, or because the purpose of the incorporators may have been to establish a monopoly. — STOCKTON v. AMERICAN TOBACCO CO., N. J., 36 Atl. Rep. 971.

44. CORPORATIONS—Stockholders.—In the absence of statutory authority, an assignee for the benefit of creditors cannot sue to enforce the double liability of the stockholders for the bank's debts.—RUNNER v. DWIGGINS, Ind., 46 N. E. Rep. 580.

45. CORPORATIONS — Stockholders' Liability. — A charter making each stockholder liable to creditors to a certain extent above the value of his shares at the time the demand was created, provided that such demand "shall have been payable within one year," does not require suit to be brought within one year after the demand becomes due.—SADLER v. NICHOLSON, S. Car., 26 S. E. Rep. 893.

46. COUNTIES — Limitation of Indebtedness. — Const. art. 8, § 6, providing that no county "shall for any purpose become indebted in any manner" above a certain amount, without the assent of three-fifths of the voters, does not apply to fees of witnesses in criminal cases and of sheriffs for serving criminal process, or to the expense of the general State election, since both of the former are necessary under the bill of rights (section 22), providing that in criminal cases the accused shall have compulsory process for witnesses and a speedy trial by an impartial jury, and the latter is necessary under Const. art 6, § 8, providing for biennial elections. — RAUCH v. CHAPMAN, Wash., 48 Pac. Rep. 253.

47. COUNTIES—Mandamus.—When a duty is enjoined by law upon the officers of a municipal corporation (a county), and such officers fail or refuse to perform the duties so enjoined upon them, *mandamus* will lie to compel the performance by such officers of the duties so enjoined upon them, and in such case the court will, to avoid multiplicity of suits and repeated applications for peremptory writs, direct full compliance, by all officers of such corporation properly before the court, with the requirements of the law under which it is their duty to act.—BLAINE COUNTY v. SMITH, Idaho, 48 Pac. Rep. 286.

48. COURTS—Supreme Court — Certification of Cases. —In a case certified to the supreme court as being within its jurisdiction, it must proceed to judgment on the whole case.—FISCHER v. JOHNSON, Mo., 39 S. W. Rep. 785.

49. COVENANT AGAINST INCUMBRANCES — Action for Breach.—A grantee can recover only nominal damages for breach of a covenant against incumbrances because of the existence of a mortgage lien, which he has not paid, and under which he has not been evicted, where his title has been extinguished by the foreclosure of a subsequent mortgage, unless it is shown that the prior lien was taken into consideration on the sale, and, as a consequence, the property did not bring its full value.—MCGUCKIN v. MILBANK, N. Y., 48 N. E. Rep. 490.

50. CREDITORS' SUIT — Judgment.—A judgment entered by confession, and which was made up in part of the amount of a note on which the plaintiff was at the time only contingently liable as indorser, is invalid, to that extent, as against other creditors subsequently obtaining judgments, though the note was afterwards actually paid by the plaintiff; and, where the judgment was collusively entered for the purpose of hindering and delaying other creditors, it will be wholly set aside.—BATES v. NORTON, N. J., 36 Atl. Rep. 968.

51. CREDITORS' SUIT—Lien.—A creditors' bill will lie to foreclose a matured mortgage given by the debtor to a third person, in order to reach the surplus, if any. —BRIDGES v. COOPER, Tenn., 39 S. W. Rep. 720.

52. CRIMINAL EVIDENCE — Homicide — Confession.— Though the discretion of the trial court in admitting evidence of a confession will not, unless it is abused, be controlled by the appellate court, such evidence should be the subject of appropriate instructions, so that the jury may consider the circumstances, and determine whether or not the evidence is entitled to any weight.—WILLIAMS v. STATE, Ark., 39 S. W. Rep. 709.

53. CRIMINAL EVIDENCE — Homicide — Insanity.—An expert witness cannot give his opinion as to the sanity of a person, based on part of the evidence of one only of several witnesses, heard by the expert, and on an account of the evidence in the same case on a former trial as published in a newspaper, which he has read.—WILLIAMS v. STATE, Tex., 39 S. W. Rep. 687.

54. CRIMINAL LAW — Disorderly House.—Under an ordinance providing for the punishment of any person found in a disorderly house or place, or a house of ill fame, or a place resorted to for purposes of prostitution, the term "disorderly house" denotes a house in which people abide, or to which they resort, disturbing by their noise the order and tranquillity of the neighbors, not necessarily a house of prostitution.—HAWKINS v. LUTTON, Wis., 70 N. W. Rep. 483.

55. CRIMINAL LAW—Effect of Appeal.—Under Code Cr. Proc. 1895, art. 884 (providing that an appeal in effect suspends all further proceedings in the court in which the conviction was had, except so far as it may be necessary to restore any portion of the record lost or destroyed, after appeal taken), the trial court cannot enter a recognizance on the minutes *nunc pro tunc*. —QUARLES v. STATE, Tex., 39 S. W. Rep. 669.

56. CRIMINAL LAW—Evidence—Murder.—If in a criminal case brought before this court under the act of May 9, 1894 (Gen. St. p. 1154), the evidence is of such a nature that, when fully and fairly examined, it will not satisfy a considerable mind, beyond a reasonable doubt, of the guilt of the accused, a conviction thereon must be set aside, and a new trial granted.—KOHL v. STATE, N. J., 36 Atl. Rep. 931.

57. CRIMINAL LAW — Federal Offenses—Bail on Appeal.—Bail on appeal in federal criminal cases must be given under the same provisions of law which allow bail to be given in a territorial criminal case.— UNITED STATES v. RAIDLER, Okla., 48 Pac. Rep. 270.

58. CRIMINAL LAW — Forgery.—Under 1 How. Ann. St. § 2, requiring statutory phrases to be construed according to common usage, a paper purporting to authorize the bearers to solicit subscriptions for a labor organization is not a "letter of attorney," or an "order for money," within the statute making such instruments the subjects of forgery.—PEOPLE v. SMITH, Mich., 70 N. W. Rep. 466.

59. CRIMINAL LAW—Forgery — Intent.—Where it appears that defendant passed a forged check to a bartender, that he was drinking, and defendant simply testifies that he was drinking, and did not remember passing the check, a charge that the jury must acquit unless they believe beyond a reasonable doubt that defendant passed the instrument as true, and knew that it was forged, is as favorable to defendant as is warranted by the testimony.—MAYNARD v. STATE, Tex., 39 S. W. Rep. 667.

60. CRIMINAL LAW—Homicide—Accident.—Homicide is not excusable as accidental but is murder, where defendant is about to kill a person of his malice aforethought, and deceased, while endeavoring to prevent defendant from carrying out that purpose, is killed

by the accidental discharge of defendant's pistol.—WHEATLY V. STATE, Tex., 39 S. W. Rep. 672.

61. CRIMINAL LAW — Rape — Accessory.—D and his stepdaughter, who was under the age of consent, were criminally intimate; and about the time a child was born to the daughter she informed her mother that D, the husband of the mother, was the father of the child. The mother then told her daughter to say to the officers of the law, if inquiry was made, that another than D was the father of the child, and the daughter made the statement as the mother advised. Within a few days thereafter, D was arrested and convicted of the offense of rape: Held, that the mere advice of the mother to her daughter to tell an untruth about the paternity of the child does not make the mother an accessory after the fact, nor constitute a crime, within the meaning of paragraph 2562, Gen. St. 1889.—STATE V. DOTY, Kan., 48 Pac. Rep. 145.

62. CRIMINAL PRACTICE—Homicide—Indictment.—An indictment which charges that the murder was committed with a gun, which defendant feloniously, willfully, and with malice aforethought did discharge and shoot off against and upon K, inflicting a mortal wound, of which he then and there died, is good.—KIBLER V. COMMONWEALTH, Va., 26 S. E. Rep. 858.

63. DAMAGES — Injury to Realty.—The measure of damages to land by the wrongful digging of ditches is the cost of filling them, not the difference in the value of the land before and after the ditches were dug.—DOSS V. BILLINGTON, Tenn., 39 S. W. Rep. 717.

64. DAMAGES—Loss of Rent.—For delay in construction of a building on plaintiff's lot, caused by defendant's building overhanging the lot and defendant's delaying removal thereof, the net rental value may be recovered; construction having been contracted for and commenced, and the building having been rented in advance, from a certain time, for a definite period, at a specified rent.—BURRESS V. HINES, Va., 26 S. E. Rep. 875.

65. DAMAGES — Market Value.—The "market" value of a leasehold is merely evidential, and not conclusive as to its value, and therefore it is error to limit to an ascertainment of the difference between the agreed rental and the "market value" of the leasehold an order of reference to ascertain damages by a breach of a contract to construct and lease to complainant a building of unprecedented size for the vicinity, and not likely to be suitable to any one except complainant.—JONAS V. NOEL, Tenn., 39 S. W. Rep. 724.

66. DECEIT — Fraudulent Representations by Purchaser.—An executor sold some certificates of stock belonging to the estate of his father, and considered worthless, for a nominal sum. Thereafter a letter was received by him, directed to the decedent, offering $2 a share for the stock. The executor repurchased it from the purchaser at the sale; stating to him that he wanted it because his father had held it so long, and that it had no value. On these representations, the sale was concluded: Held, that the executor was liable to the purchaser in an action for fraudulent representations.—EDELMAN V. LATSHAW, Penn., 36 Atl. Rep. 926.

67. DEED—Construction.—A deed of land to R and E, "to have and hold the same, to them and their heirs, forever. The condition of this deed is that said land is conveyed to R for his special use during his natural life, and at his death to his son E, to him and his heirs or assigns, forever,"—gives R a life estate, with remainder in fee to E.—TEMPLE'S ADMR. V. WRIGHT, Va., 26 S. E. Rep. 844.

68. DEEDS—Covenants.—An action for a breach of the covenants of warranty in a deed of real estate is maintainable by the grantee, although the deed in question and the mortgage back from the grantee to the defendant were a part of the same transaction and contained the same covenants of warranty, and although the relation of mortgagor and mortgagee still subsists between the parties.—HARRINGTON V. BEAN, Me., 36 Atl. Rep. 986.

69. DEEDS—Evidence — Recording.—A deed was not recorded. The grantor died, and the interest of his estate in the premises was sold to one having knowledge of the grantee's claim of title. That person's interest was sold on execution, and inherited by the purchaser's wife, who sold to one having no actual knowledge of the unrecorded deed, but knowing that the person who had succeeded to the rights under it claimed title: Held, that the last purchaser was not an innocent purchaser.—HITCHLER V. SCANLAN, Tex., 39 S. W. Rep. 633.

70. DEED—Interest Conveyed.—An instrument granting, demising, and letting "the perpetual use" of land for a tramway, which the grantee agrees to build—such right to extend as long as the premises are used for the purpose agreed on, and no longer—does not convey a fee, but is merely a lease, terminable on nonperformance of the conditions subsequent.—KNAPP V. CRAWFORD, Wash., 48 Pac. Rep. 261.

71. DEED—Mortgage.—Equity will not declare a deed a mortgage, though it was given as security only, where it was fraudulent as to creditors, in that it was intended to gain time by putting the property in the hands of the grantee.—PATNODE V. DARVEAU, Mich., 70 N. W. Rep. 439.

72. DEED—Record — Notice.—Where a grantee executes a trust deed on the land to secure the deferred payments and supplies to be advanced, and the trust deed is recorded, the trustee and beneficiaries under the trust deed are charged with notice of it, and with notice of whatever it would suggest to a prudent man, though the grantee fail to have the conveyance to him recorded.—STOVALL V. JUDAH, Miss., 21 South. Rep. 614.

73. DEED TO PARTNERS AS TENANTS IN COMMON.—Where partners take title to land as tenants in common, the presumption arising is that they hold as such in equal shares; and as to purchasers from and creditors of the individual partners the deed controls, and such purchasers and creditors have priority over the firm, claiming in contradiction of the deed.—STOVER V. STOVER, Penn., 36 Atl. Rep. 921.

74. DIVORCE—Statute.—A statute prescribing a new ground for divorce is not retroactive, and hence, to authorize a divorce thereunder, it must be shown that the ground existed after the statute went into effect.—BURT V. BURT, Mass., 46 N. E. Rep. 622.

75. DURESS—Evidence.—A mother is under duress where she is induced by threats to release a claim in order that she may save her son from criminal prosecution.—WEISER V. WELCH, Mich., 70 N. W. Rep. 438.

76. EASEMENT—Right of Way—Permissive Use.—Mere permissive use by the public, without claim of right, of a passway over and along a railroad right of way, started by being used by the railroad company in the construction of its road, gives the public no right therein.—THORNTON V. LOUISVILLE & N. R. CO., Ky., 39 S. W. Rep. 694.

77. ELECTIONS — School Directors — Returns.—One nominated and voted for for the office of school director for the term of two years cannot thereby be elected to the office; the order of court being for the election of a director for the term of one year and another for the term of three yerrs.—COMMONWEALTH V. FLETCHER, Penn., 36 Atl. Rep. 917.

78. EMINENT DOMAIN—Additional Servitude.—Where a right of way to lay and maintain a pipe line to connect a pumping station with its distributing station was condemned, the erection of poles and stretching of wires for a telephone line to connect the two stations was an additional servitude, not taken into consideration in the assessment of damages for the laying of pipes.—CITY OF SPOKANE V. COLBY, Wash., 48 Pac. Rep. 248.

79. EMINENT DOMAIN—Condemnation of Mortgaged Land.—A portion of mortgaged land was condemned for street purposes, and the award was paid while the

mortgagors were in possession, and thereafter, while the condemned strip was being used as a street, the premises were sold to the mortgagee on foreclosure: Held that, on an application first made after the time for redemption had expired, the mortgagee would not be allowed to share in the award as against a second mortgagee, to whom it had been paid in satisfaction of his mortgage debt, and an execution creditor of the mortgagors.—COMMERCIAL NAT. BANK OF SEATTLE V. JOHNSON, Wash., 48 Pac. Rep. 267.

80. EQUITABLE ASSIGNMENT.—To constitute an equitable assignment, all that is necessary is that the person to whom a fund is due or is coming due shall draw an order on the person having control of the fund, directing him to pay it to a person named, and that the drawee shall have notice of the order.—CHESAPEAKE CLASSIFIED BLDG. ASSN. V. COLEMAN, Va., 26 S. E. Rep. 843.

81. EQUITY—Bill to Enlarge Decree.—Where a decree of the supreme court simply adjudged a husband, who was trustee of his wife, individually liable for a certain debt of the wife, on the ground that he had received from the former trustee of the wife an estate more than sufficient to pay the debt, a bill by the creditor to charge the separate estate of the wife with a debt is a bill to enlarge the decree, and will not lie, though the decree recited that "for the payment of said debt said estates were liable," no estate being described or ordered sold to satisfy the debt.—HELMS V. RIZER, Tenn., 39 S. W. Rep. 718.

82. EQUITY—Jurisdiction.—Equity has jurisdiction to render a personal decree in favor of a mortgagee against a purchaser from the mortgagor who has assumed payment of the mortgage debt, though the mortgaged lands are in a different jurisdiction from that in which suit is brought.—TATUM V. BALLARD, Va., 26 S. E. Rep. 871.

83. ESTOPPEL.—The doctrine that the negligence of a party in signing a writing estops him from afterwards urging that it does not contain the true agreement of the parties is not applicable in a suit between the original parties thereto or their privies, where the party seeking enforcement practiced fraud or deception in order to induce the other to sign without reading.—WOODBRIDGE V. DE WITT, Neb., 70 N. W. Rep. 506.

84. EVIDENCE—Transfer of Note—Parol Evidence.—Parol evidence is admissible to show that a transfer of a note by indorsement in blank was made to secure a debt.—KEELER V. COMMERCIAL PRINTING CO., Wash., 48 Pac. Rep. 239.

85. EXECUTION—Sale of Lands.—Plaintiff in an execution in a sheriff's hands, on which a sale of lands had been advertised, gave the sheriff, before the sale was made, explicit orders not to sell, and paid his costs and expenses up to that date. Relying on these orders, plaintiff did not attend at the sale. Strangers to the record, knowing that the sale had been ordered off by plaintiff, persuaded the sheriff to sell. Without notice to plaintiff, the sheriff sold at nominal prices: Held, that the delivery of the deed by the sheriff would be enjoined, because the sale was a fraud on plaintiff and the execution debtor's other creditors, who were pressing for judgment. — VINELAND NAT. BANK V. SHINN, N. J., 36 Atl. Rep. 953.

86. FALSE IMPRISONMENT.—Authority in a city charter to find any one not a policeman who publicly wears a policeman's uniform does not authorize imprisonment therefor.—BOLTON V. VELLINES, Va., 26 S. E. Rep. 847.

87. FEDERAL COURTS—Actions at Law and in Equity.—The distinctions between actions at law and suits in equity in the United States courts is not one of form merely, but of vital substance, and a purely legal action cannot be converted into a suit in equity, or become entitled to be heard as such, by the answer of a defendant asserting equitable rights; but a defendant who has such rights, which he is entitled to enforce against the plaintiff, should resort to equity to arrest or stay the action at law.—OWENS V. HEIDBREDER, U. S. C. C. of App., Fifth Circuit, 78 Fed. Rep. 837.

88. FEDERAL COURTS—Error to State Courts.—A judgment of a State court, even if it be authorized by statute, whereby private property is taken for the State, or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the fourteenth amendment, and the affirmance of such a judgment by the highest court of the State is a denial by the State of a right secured by the constitution.—CHICAGO, B. & Q. R. CO. V. CITY OF CHICAGO, U. S. S. C., 17 S. C. Rep. 581.

89. FEDERAL COURTS — Guardians.—A guardian appointed by the courts of one State cannot sue, as such, in a federal court sitting in another State.—SMITH V. MADDEN, U. S. C. C., N. D. (Ohio), 78 Fed. Rep. 833.

90. FEDERAL COURTS — Judgments of Divorce.—The federal tribunals have jurisdiction of suits to relieve against judgments of State courts obtained by imposition and fraud; and this jurisdiction extends to judgments of divorce.—MCNEIL V. MCNEIL, U. S. C. C., N. D. (Cal.), 78 Fed. Rep. 834.

91. FEDERAL COURTS—Receivers—Property in other States.—A federal court in one State cannot reach property in another State by means of a receiver.—KITTEL V. AUGUSTA, T. & G. R. Co., U. S. C. C., S. D. (N. Y.), 78 Fed. Rep. 855.

92. FRAUDS, STATUTE OF — Contract.—Evidence that plaintiff and decedent had maintained illicit relations up to the latter's death; that 10 years prior thereto he purchased certain premises, and placed plaintiff and their illegitimate child in possession thereof, but kept the title in his own name, paid the taxes, insurance, etc., and erected a barn, which he used in common with plaintiff; and that he always recognized the child as his own—does not so unmistakably show part performance of a contract to convey the premises to plaintiff in consideration that she would support the child, as to warrant parol evidence of such an agreement.—VAN EPPS V. REDFIELD, Conn., 36 Atl. Rep. 1011.

93. FRAUDULENT CONVEYANCES—Actions to Set Aside.—Where a mortgage is in fraud of creditors, and the mortgagee obtains title by foreclosure, a complaint by the mortgagor to set aside the deed, and establish a trust for the benefit of creditors, must show that the conveyance was procured by fraud of the mortgagee.—KROUSKOP V. KROUSKOP, Wis., 70 N. W. Rep. 475.

94. FRAUDULENT CONVEYANCE—Evidence.—On an issue as to the *bona fides* of a sale of a stock of goods, between one claiming as a purchaser and an attachment creditor of the former owner, evidence that the claimant had paid no privilege tax prior to the attachment, that the only license posted in the store at that time was one issued to the former owner, and that there was no sign on the store bearing the claimant's name, is incompetent.—WILKERSON V. MOFFETT-WEST DRUG CO., Miss., 21 South. Rep. 564.

95. FRAUDULENT CONVEYANCES — Separate Property of Wife.—Though property bought with the separate money of a wife is managed by her husband in his own name, but, after being sold, the proceeds are returned to the wife, equity will not subject property subsequently acquired by her with such proceeds in her own name to a debt of her husband, for which he became liable through the default of another, on a contract made after the wife's property had been sold, and the proceeds turned over to her, in the absence of proof of any act of fraud or concealment, or showing that the creditor entered into the contract or afterwards changed his position on the faith of the husband's supposed ownership of her property.—HALL V. WARREN, Ariz., 48 Pac. Rep. 214.

96. FRAUDULENT CONVEYANCES — Withholding Deed from Record.—Withholding from record a deed executed by a husband to his wife, for value, without a common purpose to give the grantor a false credit, does not render it fraudulent as to subsequent credit-

ors, whose liens are acquired after the instrument is recorded, though the grantor represented, at the time he contracted the debt, that he owned the property.—CAMPBELL V. REMALY, Mich., 70 N. W. Rep. 482.

97. GUARANTY — Construction.—The liability of a guarantor cannot be extended beyond the exact terms of his contract, and an instruction confining the deliberations of the jury thereto, in an action against a guarantor, is not erroneous.—LININGER & METCALF CO. V. WEBB, Neb., 70 N. W. Rep. 519.

98. GUARDIAN AND WARD.—A bank which permits a guardian to withdraw money due his ward as administrator is liable therefor, though at the time of the withdrawal there were no known creditors of the estate, and the ward was sole distributee.—RYAN V. NORTH END SAV. BANK, Mass., 46 N. E. Rep. 620.

99. GUARDIAN AND WARD — Contract.—A guardian cannot be held liable in an action at law upon an express or implied contract made by his ward, or by some other person for such ward, even for necessaries, unless such guardian was a party to the contract, or agreed to perform it.—BAIRD V. STEADMAN, Fla., 21 South. Rep. 572.

100. HIGHWAYS—Collateral Attack.—A judgment of a county court establishing a highway, after it has acquired jurisdiction by the filing of a sufficient petition, and by proof of due notice to the several owners, cannot be attacked in ejectment by a grantee of one of the owners on the ground that the grantor did not in fact relinquish a right of way.—MITCHELL V KANSAS CITY, ETC. RY., Mo., 39 S. W. Rep. 790.

101. HOMESTEAD — Lease — Joinder of Wife.—Under Const. art. 16, § 2, and 2 How. Ann. St. § 7722 (which require the signature of the wife to an instrument to bar the homestead right), a life lease of a homestead, the title to which is in the husband, is valid and effective if signed and acknowledged by the husband and wife, though the husband's name only appears as lessor in the body of the instrument.—BARRETT V. COX, Mich., 70 N. W. Rep. 446.

102. HUSBAND AND WIFE — Agency.—A wife may be held liable to parties furnishing materials for the finishing and repairing of her dwelling house, sold and delivered upon the husband's credit, under the belief that he was the owner, when it appears that he acted as her agent.—MAXCY MANUFG. CO. V. BURNHAM, Me., 36 Atl. Rep. 1003.

103. HUSBAND AND WIFE — Community Property.—Under Civ. Code, § 679, providing that "the ownership of property is absolute when a single person has the absolute dominion over it;" and section 172 which, before amended (Act March 31, 1891), provided that "the husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate,"—the husband was the absolute owner of the community property, in which the wife had no vested right till the dissolution of the marriage.—SPRECKELS V. SPRECKELS, Cal., 48 Pac. Rep. 228.

104. HUSBAND AND WIFE—Community Property—Collateral Attack.—The statutes of Texas provide (Rev. St. 1895, art. 2222, *et seq.*), that a husband who survives his wife, in order to be appointed administrator of and authorized to sell the community property, must give a bond conditioned for faithful administration of such property and payment of one-half to the persons entitled, which bond shall be approved by the county judge, whose order of approval shall be recorded in the minutes of the court which has general jurisdiction in probate matters: Held, that an order so made is in effect a judgment of the court, and is not void or open to attack in a collateral proceeding, although the bond accepted and approved by it does not conform to the statutory requirements.—TOWNSEND V. P. J. WILLIS & BRO., U. S. C. C. of App., Fifth Circuit, 78 Fed. Rep. 850.

105. HUSBAND AND WIFE — Estoppel — Replevin.—In replevin, where plaintiff claimed title from G, and defendant from G and his wife, the issue of the wife's sole ownership was properly left to the jury, on evidence that the husband bid off the property in her name at an auction, and used her money in part payment, and on his testimony that the property was hers, though he paid a part of the price.—INGALS V. ALEXANDER, Mo., 39 S. W. Rep. 801.

106. HUSBAND AND WIFE—Recovery for Wife's Services.—A husband may recover for services rendered both by himself and his wife in nursing a person who was a member of his household the services of the wife being in the line of her household duties, and presumably for the benefit of the husband.—HENSLEY V. TUTTLE, Ind., 46 N. E. Rep. 594.

107. INJUNCTION — Action in Another State.—Courts have no power to enjoin the creditor from suing his debtor merely because the suit is brought in another State to subject to the creditor's demand the debt contracted here by the corporation domiciled in that State with an agent here to represent it, and because this is the domicile of the debtor.—COMMERCIAL SOAP WORKS V. F. A. LAMBERT CO., La., 21 South. Rep. 689.

108. INJUNCTION — Execution of Criminal Statute.—An injunction will not issue to restrain the execution of a criminal statute.—LECOURT V. GASTER, La., 21 South. Rep. 646.

109. INJUNCTION — Railroad Company—Use of Street.—Injunction against a railroad company to restrain the laying of a switch track in a street used by the public for over 30 years will lie at the instance of one whose property will be specially injured thereby.—ILLINOIS CENT. R. CO. V. THOMAS, Miss., 21 South. Rep. 601.

110. INJUNCTION AGAINST MUNICIPALITY—Estoppel.—The failure of a taxpayer to object to the illegal expenditure of money by the municipality does not estop him from restraining a subsequent legal expenditure for the same purpose.—SAVIDGE V. VILLAGE OF SPRING LAKE, Mich., 70 N. W. Rep. 425.

111. INSANE PERSONS — Guardian ad Litem.—Rev. St. § 2615, providing that the court may appoint a guardian for an "insane defendant," or for a party who becomes insane pending suit, and Sanb. & B. Ann. St. §§ 3976-3982, providing generally for the appointment of guardians for insane persons, do not preclude a plaintiff, who states in his complaint that he was "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary transactions, or to protect and preserve his property rights," when defendant fraudulently procured an exchange of land, from suing in his own name without a guardian *ad litem* to set aside the exchange.—MENZ V. BEEBE, Wis., 70 N. W. Rep. 468.

112. INSOLVENCY — Judgment.—If, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment, so far as to defeat any claim for an allowance under it against the insolvent estate.—IN RE EMERY, Me., 36 Atl. Rep. 992.

113. INSOLVENCY—Set-off.—In an action by a receiver of an insolvent, a demand due from the insolvent to defendant before appointment of the receiver may be set off in a case otherwise proper.—SHEAFE V. HASTIE, Wash., 48 Pac. Rep. 246.

114. INSURANCE—Action on Policy.—Though a policy of insurance provides that the description of the property shall be a part of the contract and a warranty by the insured, it does not impose on plaintiff, in an action on the policy, the burden of proving the truth of such description as a prerequisite to the right to recover.—MOROTOCK INS. CO. V. FOSTORIA NOVELTY GLASS CO., Va., 26 S. E. Rep. 850.

115. INSURANCE—Assignment of Insurance Policy.—A complaint in an action against an insurance company, which averred that defendant was notified of a conveyance of the property insured, and agreed that the policy should become payable to the purchaser in case of loss, and to indorse such transfer on the policy, but that it neglected to do so, and waived such indorse-

ment, and so notified plaintiff, sufficiently shows, as between the parties to the action, an equitable assignment of the policy by the insured to the purchaser, and the making of a new contract with the purchaser. —GERMAN-AMERICAN INS. CO. v. SANDERS, Ind., 46 N. E. Rep. 535.

116. INSURANCE — Incumbrances. — A provision in a policy that it should be void if the property was mortgaged on or after the date of the policy was valid, and a breach thereof forfeited the policy.—SULPHUR MINES CO. v. PHENIX INS. CO. OF BROOKLYN, Va., 26 S. E. Rep. 856.

117. INSURANCE—Incumbrance on Property Insured—Notice.—The fact that the agent of an insurance company, authorized to issue and countersign policies, previous to the issuance of a policy on personal property had, as a notary public, filled out and taken the acknowledgment of a mortgage on the property insured, is not notice to the company of the mortgage so as to constitute a waiver of a condition of the policy against incumbrances. — SHAFFER v. MILWAUKEE MECHANICS' INS. CO., Ind., 46 N. E. Rep. 557.

118. INTOXICATING LIQUORS.—Where a bond given on the grant of a license to sell liquor was executed and accepted in good faith, and all other requirements of the statute were complied with by the applicant, sales made under the license granted would not constitute a criminal offense, and establish unfitness to be intrusted with the license, though the bond proved invalid for want of the principal's name.—NORTH v. BARRINGER, Ind., 46 N. E. Rep. 531.

119. INTOXICATING LIQUORS — Civil Damages.—In an action by a wife for damages for sale of liquor to her husband, evidence of his conviction of drunkenness caused by the liquor is admissible, not to prove the drunkenness, but to show damages.—LUCKER v. LISKE, Mich., 70 N. W. Rep. 421.

120. INTOXICATING LIQUORS — Illegal Sale. — A liquor dealer who gives a bond, as required by Act March 17, 1875, § 4, conditioned to pay all fines and costs that may be assessed against him for violations of the liquor laws, is not liable thereon for the amount of a fine imposed on his bartender for an unlawful sale made without the obligor's knowledge. — STATE v. LEACH, Ind., 46 N. E. Rep. 549.

121. INTOXICATING LIQUORS — License — Burden of Proof.—On a prosecution for selling liquor without a license, the burden is on defendant to show that he had a license.—STATE v. SHELTON, Wash., 48 Pac. Rep. 258.

122. INTOXICATING LIQUOR — Sale by Agent. — Where the State gave evidence that the illegal sale was made by defendant's clerk, as his agent, and no evidence was introduced to disprove such agency, an instruction that if the clerk was acting for defendant at the time of the illegal sale, and made the sale, the offense was proven, was not objectionable because it failed to expressly state that the sale must have been made with defendant's consent, express or implied.—STATE v. CURTISS, Conn., 36 Atl. Rep. 1014.

123. JUDGMENT — Default—Res Judicata.—There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action upon a different claim or cause of action. In the former case a judgment on the merits constitutes an absolute bar to a subsequent action, not only as to every matter offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose. But, where the second action is upon a different claim or demand, a judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or verdict was rendered. — SLATER v. SKIRVING, Neb., 70 N. W. Rep. 493.

124. JUDGMENT AGAINST GARNISHEE. — Judgment against a garnishee for a debt due by him to defendant, entered after judgment against defendant in the principal suit, should not exceed the amount of the judgment, interest, and costs in the principal suit, even if the verdict of the jury or answer of the garnishee discloses the fact that the garnishee is indebted to defendant in a sum greater than the amount stated. —TURNER v. ADAMS, Fla., 21 South. Rep. 575.

125. LANDLORD AND TENANT—Rent.—A provision in a lease for a farm fixing the amount for which the landlord shall have a lien for rent on the crop applies only to the lien given him under the agricultural lien statute, and does not deprive him of his general right as landlord, independently of statute, to distrain for rent due.—PARROTT v. MALPASS, S. Car., 26 S. E. Rep. 884.

126. LANDLORD AND TENANT — Destruction of Buildings. — Where a lease contains no agreement to repair or to deliver the premises in good condition at the end of the term, the lessor cannot recover from the lessee damages to buildings thereon, caused by an explosion, without proof of defendant's negligence. — EARLE v. ARROGAST, Penn., 36 Atl. Rep. 923.

127. LANDLORD AND TENANT—Fixtures — Construction of Lease.—Dynamos and other electrical machinery placed in a leased building for the purpose of furnishing power for an electric light system extending to other buildings are not "erections or additions" to the leased premises, within the terms of the lease requiring erections and additions thereon to be surrendered with the premises to the landlord on the termination of the lease.—LIEBE v. NICOLAI, Oreg., 48 Pac. Rep. 172.

128. LANDLORD AND TENANT — Use and Occupation.—Where defendant occupied the premises of plaintiff by his consent, as successor in interest to a lessee, and during the term of the lease paid rent at the rate therein stipulated, and thereafter by consent of plaintiff occupied as tenant, plaintiff could recover for such subsequent use and occupation. — WEAVER v. SOUTHERN OREGON CO., Oreg., 48 Pac. Rep. 167.

129. LIBEL.—An anonymous publication, made in the form of a printed pamphlet, which purports to be a reply to another communication, the authorship of which is not furnished, cannot be said to be libelous *per se*, as allegation and proof are required to connect such pamphlet with the complainant. — MIELLY v. SOULE, La., 21 South. Rep. 593.

130. LIEN ON THRESHING MACHINE.—Under St. 1885, p. 109, § 1, providing that every person performing work in or about any threshing machine while engaged in threshing shall have a lien thereon for his services, a person so performing work at the employment of one who is lawfully in possession and operation thereof, under contract with the owner, is entitled to such lien. —LAMBERT v. DAVIS, Cal., 48 Pac. Rep. 123.

131. LIFE INSURANCE — Application. — Knowledge on the part of an officer of a life insurance company who took an application that the applicant had taken the Keeley treatment for the liquor habit is notice to the company of all that such fact implies; and the acceptance of the application is a waiver of its conditions as regards the previous habits of the applicant, though misrepresentations may have been made therein as warranties.—DE WITT v. HOME FORUM BENEFIT ORDER, Wis., 70 N. W. Rep. 476.

132. LIMITATIONS.—The statute of limitations may be interposed against an amendment to a cause of action, where such amendment sets up an entirely new cause, wholly outside of and independent of that previously set forth in the petition, such an amendment being, in effect, a new cause of action.—BUTT v. CARSON, Okla., 48 Pac. Rep. 182.

133. LIMITATION. — A court of equity will not apply the statute of limitations, not in terms applicable to suits in equity, to bar a suit by a *cestui que trust* to enforce an express trust for the sale of lands.—CARTER v. UHLEIN, N. J., 36 Atl. Rep. 956.

134. LIMITATIONS—Claim Maturing after Death of Obligor.—Limitation does not begin to run against an ac-

tion on a claim against a decedent who died before its maturity, when no administration exists on his estate at the time the cause of action accrues. Code Civ. Proc. § 353, providing for an extension of the time for bringing an action for one year after the issuance of letters testamentary or of administration, applies only when the statute has commenced to run before the death of the debtor.—IN RE BULLARD'S ESTATE, Cal., 48 Pac. Rep. 219.

135. LIMITATIONS — Fraudulent Concealment. — The mere concealment by a purchaser of the value of lands which the vendor has an opportunity to ascertain is not such fraudulent concealment as will prevent the running of limitations no trust relations existing between the parties.—WOODFOLK V. MARLEY, Tenn., 39 S. W. Rep. 747.

136. LIMITATIONS—Mortgages—Subsequent Grantees. —Under Code Civ. Proc. § 25, providing that on any payment on any indebtedness, after it becomes due, limitations shall commence from such time, a payment made by a person who was in no way liable to the creditor, and who has no property interest to be protected against the enforcement of the debt, will not prevent the running of the statute in favor of the persons liable thereon, or upon whose property it is a charge.—DUNDEE MORTGAGE & TRUST INVESTMENT CO. V. HORNER, Oreg., 48 Pac. Rep. 175.

137. LIMITATION OF ACTIONS. — Where a mortgage provides that on default in interest the whole sum shall become due, and the mortgage may be foreclosed, limitations begin to run only when the note matures according to its terms, and not on default in interest. —RICHARDS V. DALEY, Cal., 48 Pac. Rep. 220.

138. MANDAMUS—State Board of Dental Examiners.— Act March 12, 1885, relating to the practice of dentistry, creates a board of examiners, and provides (section 5) that, if the examination "prove satisfactory," the board shall issue to qualified persons certificates, and shall indorse as satisfactory diplomas from any "reputable" dental college, "when satisfied of the character of such institution," on the holder furnishing "evidence satisfactory to the board" of his or her right to the same: Held, that the duties of such board are judicial, and its action in finding an examination unsatisfactory, or refusing to indorse "as satisfactory" a diploma from a dental college, is final.—VAN VLECK V. BOARD OF DENTAL EXAMINERS OF CALIFORNIA, Cal., 48 Pac. Rep. 223.

139. MANDAMUS TO JUSTICE.—*Mandamus* will not lie at the relation of a citizen to compel a justice of the peace to remove his official residence to the precinct in which, under the law, he should have such office.— CHAPMAN V. PEOPLE, Colo., 48 Pac. Rep. 153.

140. MARRIAGE — Consent — Consummation.—Under Civ. Code, § 55, authorizing marriage by consent, and subsequent assumption of marital rights and duties, and section 57, providing that such consent and assumption may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases, a contract of present marriage (constituting consent), followed at any time by the parties assuming the rights and duties of the marital relations, both understanding and intending thereby to consummate the marriage contract, make a valid marriage.—IN RE RUFFINO'S ESTATE, Cal., 48 Pac. Rep. 127.

141. MARRIAGE—Evidence.—An engagement to marry, no time being fixed therefor, followed by the parties cohabiting and recognizing each other as husband and wife, is, in the absence of rebutting evidence, conclusive of a common-law marriage at that time, though thereafter, during their continued cohabitance, they have a marriage ceremony performed.—SIMMONS V. SIMMONS, Tex., 39 S. W. Rep. 689.

142. MARRIED WOMAN—Contracts.—In the absence of an enabling act, contracts of married women are cognizable only in equity, so that, except as affected by the married women's act (Rev. St. §§ 2342-2345), such contracts cannot be enforced at law.—MUELLER V. WIESE, Wis., 70 N. W. Rep. 485.

143. MASTER AND SERVANT — Negligence.—It is the settled law in this State that an employer is not liable for the negligent acts of a contractor or his servants where the contractor carries on an independent business, and, in doing his work, does not act under the direction and control fo his employer, but determines for himself in what manner it shall be carried on; and that such employment does not create the relation of master and servant.—LEAVITT V. BANGOR & A. R. CO., Me., 36 Atl. Rep. 998.

144. MASTER AND SERVANT—Assumed Risk.—An employee who is sent into an engine room, where a fly wheel has shortly before exploded, to clear away the ruins, assumes the risk of injury by the fall of fragments of iron lodged in the ceiling, though unknown to him, and is not entitled to rely on the employer having made an inspection of the room before sending him in.—KANZ V. PAGE, Mass., 46 N. E. Rep. 620.

145. MASTER AND SERVANT—Contributory Negligence —Defective Roadbed.—In an action for the death of plaintiff's intestate by a defect to the roadbed of defendant railroad company, by whom he was employed, the complaint must show that defendant did not provide its employees with a reasonably safe place to work; that the intestate was free from fault proximately contributing to his death; and that he had no knowledge of the dangerous condition of the roadbed at the time he was killed.—CHICAGO & E. R. CO. V. LEE, Ind., 46 N. E. Rep. 543.

146. MASTER AND SERVANT — Defects in Car—Negligence.—A railroad company is liable for the death of a brakeman killed while coupling a moving car to a stationary car improperly loaded with lumber, where the drawhead on the loaded car was driven in by the collision because of defects in the draft timbers, and deceased's head was caught between the moving car and a projecting timber.—TEXAS & N. O. RY. CO. V. BELL, Tex., 39 S. W. Rep. 686.

147. MASTER AND SERVANT — Fellow-servants.—The "shift boss" of a mine acts as a vice-principal in directing a miner to work at a certain place without notifying him of unexploded blasts at such place, the existence of which is known to the boss.—MCMAHON V. IDA MIN. CO., Wis., 70 N. W. Rep. 478.

148. MASTER AND SERVANT — Liability for Servant's Negligence.—The minor son of defendant, who was directed by him to shoot crows in a field, but who went into the woods to hunt squirrels, and when some two miles from defendant's premises, by his negligence, injured plaintiff, was not at the time of the act engaged in defendant's business, so as to render defendant liable for the injury.—WINKLER V. FISHER, Wis., 70 N. W. Rep. 477.

149. MASTER AND SERVANT—Negligence—Assumption of Risk.—Plaintiff was employed in removing earth from a bank with a steam shovel. The method of work required removal of the earth from the base, and defendant had been in the habit of lessening the danger from falling earth by blasting or prying down the top, but the bank had been left undermined and bulging at the top for several hours: Held, that plaintiff did not assume all the risks of injury from falling dirt, but only such as were incident to the work as conducted.—BRADLEY V. CHICAGO, M. & ST. P. RY. CO., Mo., 39 S. W. Rep. 768.

150. MECHANICS' LIENS—Priority.—A person who furnishes material and does work on a building, taking in payment therefor machinery, loses priority of lien over a *bona fide* mortgagee who advanced money after such payment, though the title to the machinery fails and it is taken on replevin by the legal owner.—GARRETT V. ADAMS, Tenn., 39 S. W. Rep. 730.

151. MORTGAGES—Assignment — Power of Sale.—An assignment of a note with mortgage securing it, and containing a power of sale, does not carry with it the power of sale.—HUSSEY V. HILL, N. Car., 26 S. E. Rep. 919.

152. MORTGAGE—Bill to Redeem.—No tender or offer to redeem is requisite to enable a mortgagor to maintain a bill to redeem, where it is charged that, by reason of usurious interest charged, and gross overcharges and false items in an account for goods entering into the mortgage, an itemized statement of which defendant has at all times refused to furnish, though demanded, complainant is unable to know the amount actually due, and the bill asks an accounting, and that the debt be purged of usury.—AUST v. ROSENBAUM, Miss., 21 South. Rep. 555.

153. MORTGAGE—Deed of Trust.—A deed of trust given to secure purchase money on the land bought and "the crop to be raised by us" during the succeeding year, embraces the crop on no other land than that conveyed.—PETTIS v. SULLIVAN, Miss., 21 South. Rep. 607.

154. MORTGAGE—Foreclosure—Judgment.—Rev. St. § 3162, declaring that a judgment for plaintiff in foreclosure shall adjudge that the premises be sold for the amount due, etc., is mandatory; and an adjudication that plaintiff is entitled to foreclosure unless defendant within a certain time pays into court the amount due, in which case the complaint shall be dismissed, is erroneous.—SPENGLER v. HAHN, Wis., 70 N. W. Rep. 466.

155. MORTGAGES—Foreclosure—Taxes and Insurance.—In foreclosure of a mortgage which provides for the payment of taxes and insurance, and that the same shall be a lien, amounts paid therefor after the bill is filed and before decree may be included in the decree.—JEHLE v. BROOKS, Mich., 70 N. W. Rep. 440.

156. MORTGAGE—Foreclosure Sale—Surplus.—Where the holder of two mortgages on the same land procured separate decrees of foreclosure, and, after bidding in the property at a sale under the junior decree for the amount thereof, obtained an order of sale under the senior decree, and purchased thereat for an amount in excess of such decree, the surplus must be applied in satisfaction of the junior lien, which was displaced, but not extinguished, by the senior purchase.—STATE v. CLAPP, Ind., 46 N. E. Rep. 533.

157. MORTGAGE—Purchase Money.—A mortgage given by the wife at the time of the purchase of real estate, to secure the unpaid purchase money, is valid security, though not signed by the husband, notwithstanding the property was purchased for, and occupied as a family homestead.—PROUT v. BURKE, Neb., 70 N. W. Rep. 512.

158. MORTGAGE LIEN—Declaration of Homestead.—Under the law of Idaho a mortgage lien cannot be defeated by a declaration of homestead made after the mortgage lien attaches.—LAW v. SPENCE, Idaho, 48 Pac. Rep. 262.

159. MUNICIPAL CORPORATION—Defective Sidewalks.—The defense that plaintiff's claim for injury caused by a defective walk was not presented to the city council, as prescribed by charter, is waived, unless interposed at the trial.—CANFIELD v. CITY OF JACKSON, Mich., 70 N. W. Rep. 444.

160. MUNICIPAL CORPORATIONS—Elevated Railroads—Injunction.—Where a city authorizes the building and operation of an elevated railroad in a street, such damages as an owner of abutting property may suffer are merely consequential, and since he has a complete remedy by an action at law therefor, he cannot enjoin the building and operation of the road.—DOANE v. LAKE ST. EL. R. CO., Ill., 46 N. E. Rep. 520.

161. MUNICIPAL CORPORATIONS—Obstruction of Street—Negligence.—Where the owner of a truck for several months has left it in the street at a particular place during the night, with the knowledge of a patrolman, but without authority from the city, and a fireman, driving on the street at night, collides with it, the question of the city's negligence is for the jury.—FARLEY v. MAYOR, ETC., OF CITY OF NEW YORK, N. Y., 46 N. E. Rep. 506.

162. MUNICIPAL CORPORATIONS—Officers—Removal.—A statutory provision that the mayor and council of a city of a designated class are authorized to provide for removing officers of such city for misconduct does not clothe the council with power to remove the mayor, and any attempt to exercise such power is null and void.—STAHLHUT v. BAUER, Neb., 70 N. W. Rep. 496.

163. MUNICIPAL CORPORATION — Ordinance.—Lottery Tickets.—A city ordinance relating to the sale of lottery tickets which provides that one-half of any money recovered from violators thereof shall be the property of the party who shall furnish the information on which they shall be convicted is neither illegal nor *ultra vires*.—STATE v. ORIOL, La., 21 South. Rep. 634.

164. MUNICIPAL CORPORATIONS — Ordinances—Sale of Liquors.—The dispensary law, forbidding the sale of liquors within the State except by certain officers or agents, and prescribing penalties, does not prevent a city from prohibiting the sale of liquors within its limits except as authorized by such law, where the city otherwise has the power to prohibit such sale, in the absence of any provision in the statute forbidding a municipal corporation to pass an ordinance making it a penal offense to sell liquors therein.—CITY OF FLORENCE v. BROWN, S. Car., 26 S. E. Rep. 880.

165. MUNICIPAL CORPORATIONS — Police Power—Ordinance.—An ordinance enacted within the power conferred by a constitutional grant of the legislature may not be declared invalid because it is unreasonable.—TOWN OF DARLINGTON v. WARD, S. Car., 26 S. E. Rep. 906.

166. MUNICIPAL CORPORATIONS—Water Rents.—Water rents, fixed by a board of water commissioners, and charged to persons actually using the water, for the water so used, are not, in any just sense, taxes, so that persons against whom they are charged are entitled to notice and an opportunity to be heard before they are established.—SILKMAN v. BOARD OF WATER COMRS. OF CITY OF YONKERS, N. Y., 46 N. E. Rep. 612.

167. MUNICIPAL INDEBTEDNESS—Limitations.—A contract by a city to pay a fixed price annually for a certain period—such payment to be contingent on the supply furnished—does not create an indebtedness on the part of the city, within Const. art. 10, § 12, fixing the lawful limit of municipal indebtedness.—LAMAR WATER & ELECTRIC LIGHT CO. v. CITY OF LAMAR, Mo., 39 S. W. Rep. 768.

168. NATIONAL BANKS—Liability of Stockholders.—A stockholder in a national bank is liable to the receiver thereof on a note given to the bank for capital stock.—HEPBURN v. KINCANNON, Miss., 21 South. Rep. 569.

169. NATIONAL BANK—Liability of Transferror of Stock.—It is not necessary, in order to hold liable for an assessment upon the shareholders of an insolvent national bank one who has transferred his stock to an irresponsible person, to show that the transferror had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer with intent to relieve himself from individual liability.—COX v. MONTAGUE, U. S. C. C. of App., Sixth Circuit, 78 Fed. Rep. 845.

170. NATIONAL BANKS — Transfer.—Where there is no provision in the law of the bank subjecting shares to the payment of a shareholder's debts to the bank, held, that a transferee of shares that are transferable only on the books of the bank by the shareholder or his attorney and a surrender of the certificate takes a perfect title to the shares, and may assert the same by transferring the shares under a power for the purpose to himself, and require the bank, upon surrender of the certificate, to give a new one therefor, certifying that the shares stand recorded in his own name; also, he may do this against subsequent purchasers from, or attaching creditors of, the assignor, or his assignees in insolvency or bankruptcy.—BATH SAV. INST. v. SAGADAHOC NAT. BANK, Me., 36 Atl. Rep. 996.

171. NEGLIGENCE—Highways — Imputed Negligence.—The negligence of a husband in driving with his wife in a vehicle over a defective highway, whereby injury occurs to the wife, cannot be imputed to her in

bar of an action for damages against the township permitting such defects, where it is not shown that the husband was under the direction and control of the wife at the time.—READING TP. v. TELFER, Kan., 48 Pac. Rep. 134.

172. NEGOTIABLE INSTRUMENT — Notes — Liability of Indorser.—To charge an indorser on a note payable at a certain bank, the bank being at maturity of note in the hands of a receiver, and he having removed its books and assets to another building, and there opened a receiver's office, the note should be presented for payment at such office, but need not be presented at the building occupied by it before suspension, though another bank has gone into business there.—HUTCHISON v. CRUTCHER, Tenn., 39 S. W. Rep. 725.

173. OFFICERS — Removal by Appointing Power.—A territorial treasurer, appointed by the governor after the adoption of Rev. St. par. 3049, declaring that every officer whose term is not fixed by law holds at the pleasure of the appointing power, may be removed at any time; the act creating such office having failed to fix the tenure.—COLE v. TERRITORY OF ARIZONA, Ariz., 48 Pac. Rep. 217.

174. PARENT AND CHILD — Services Rendered by Parent to Child.—Where a son became insane after he ceased to be a member of his mother's family, and while he was insane she rendered services in taking care of him, in good faith, and with an understanding with one supposed to be his legal guardian that she was to be compensated therefor, a reasonable sum paid her for such services was a proper charge against his estate.—JESSUP v. JESSUP, Ind., 46 N. E. Rep. 550.

175. PARTIES—Action by Equitable Owner of Note.—Under the statute requiring actions to be prosecuted by the real party in interest, a plaintiff may recover on a note payable to another, though not assigned, on allegation and proof that he is the equitable owner.—SEATTLE NAT. BANK v. EMMONS, Wash., 48 Pac. Rep. 262.

176. PARTITION.—In partition, where complainant's right to have one-half of the property set off to him in severalty is unquestioned, he is entitled to a decree, though the legal title to the other half interest is in dispute between defendants.—EGNER v. MEIS, N. J., 36 Atl. Rep. 948.

177. PARTNERSHIP—Distribution of Assets.—Where a partner borrows money to put into the firm's business, and to his individual note for it signs also the firm name, and afterwards pays the note, the payee cannot enforce it, for the maker's benefit, against the firm, which has in the meantime made an assignment for creditors.—LIVERMORE v. TRUESDELL, Colo., 48 Pac. Rep. 277.

178. PARTNERSHIP—Usury.—When, in the course of the dealings and business of a commercial partnership, accounts with its customers are periodically cast up and stated, and interest at the rate of 8 per cent. is computed upon such balances as may be found due, and carried into future settlements as part of the capital, the receivers of a subsequently organized corporation, into which such partnership has been merged, have no right of action to overhaul same upon a claim that usurious interest has been charged.—IN RE LEEDS & CO., La., 21 South. Rep. 617.

179. PAYMENT — What Constitutes.—Acceptance by a creditor of the note of a third person in full satisfaction of the debt extinguishes such debt, though the note is for a less sum.—WIPPERMAN v. HARDY, Ind., 46 N. E. Rep. 587.

180. PAYMENT BY BANK DRAFT.—In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored.—NATIONAL LIFE INS. CO. v. GOBLE, Neb., 70 N. W. Rep. 503.

181. PLEADING—Complaint — Carriers.—A complaint against a railroad company and one G, alleging that the latter is a duly appointed receiver of the court, and is in charge and has control of the business of the defendant company, does not allege that he has such charge as the receiver of the company or its property.—VASELE v. GRANT STREET ELECTRIC RY. CO., Wash., 48 Pac. Rep. 249.

182. PLEADING—Parties—Substitution.—Where one is substituted as plaintiff on the ground of an assignment of the cause of action by the original plaintiff, the assignment must be alleged in the supplemental complaint, and, if put in issue, must be proved.—FORD v. BUSHARD, Cal., 48 Pac. Rep. 119.

183. PLEDGE—Dismissal.—Under evidence introduced by a pledgee suing on collateral notes that the debt for which they were pledged as security has been fully paid since the action was commenced, and that he has no longer any interest in the pledge, it must be assumed that he has also been paid his costs in the action, which it was his right to demand before surrendering the collateral.—MATHEWS v. CANTEY, S. Car., 26 S. E. Rep. 894.

184. PRINCIPAL AND AGENT — Authority of Agents—Specific Powers.—Where the directors of a bank authorized the president, cashier, and two of the directors as a committee to purchase certain land at a fixed price, the president and cashier had no authority to authorize a third person to buy the land at an increased price, so as to bind the bank to pay such person a commission therefor.—BRYANT v. BANK OF COMMERCE, Wis., 70 N. W. Rep. 480.

185. PRINCIPAL AND AGENT—Collections—Payment.—An agent employed to make collection of commercial paper is, as the result of that relation, authorized to receive, in payment thereof, such coin or currency only as is by law declared to be a legal tender, or which is by common consent treated as money, and, in commercial transactions, passes as such at par.—MOORE v. POLLOCK, Neb., 70 N. W. Rep. 541.

186. PRINCIPAL AND AGENT — Limitations.—Where an agent of defendant, who was also county auditor, was intrusted, as such agent, by plaintiff with money for the payment of a school-fund mortgage, and he returned to plaintiff the mortgage and notes, marked "Satisfied," it being his duty, as auditor, to so mark them on receipt of payment, but the mortgage was not in fact paid, and was afterwards enforced against plaintiff, the statute did not commence to run against an action to recover the money from defendant until plaintiff discovered the fraud.—DAY v. DAGES, Ind., 46 N. E. Rep. 589.

187. PRINCIPAL AND SURETY — Contract of Suretyship —Construction. — The agreement of a surety on a written contract for the purchase of beer in car-load lots cannot be extended to cover purchases made by his principal in smaller quantities.—GRASSER & BRAND BREWING CO. v. ROGERS, Mich., 70 N. W. Rep. 445.

188. PRINCIPAL AND SURETY — Release of Surety. — A surety is not released from his obligation by the voluntary extension to his principal of a credit greater than that for which the surety has agreed to become bound, when no change is made in the terms of the contract between the principal and his creditor. — FERTIG v. BARTLES, U. S. C. C., D. (N. J.), 78 Fed. Rep. 866.

189. PRINCIPAL AND SURETY — Rights of Surety. — A surety may, in equity, compel his principal to exonerate him, by discharging the debt for which both are liable, without first paying it himself.—DOBIE v. FIDELITY & CASUALTY CO. OF NEW YORK, Wis., 70 N. W. Rep. 482.

190. PRINCIPAL AND SURETY—Sureties.—One who, under the belief that a note executed by a mother and son for money loaned to the son was their joint and several note, as it purported to be, signed the same as surety, is not liable for contribution at the suit of the mother, who paid the note on her son's default, but who never claimed to be a co-surety before suit.—TURNER v. OVERALL, Tenn., 39 S. W. Rep. 756.

191. PROCESS — Service. — Service of summons on a corporation, by delivering a copy to its secretary at its principal office or place of business in the county where action is brought, is sufficient, though the return does not show that he resided or had an office in the county.—WEAVER v. SOUTHERN OREGON CO., Oreg., 48 Pac. Rep. 171.

192. QUIETING TITLE—Presumption of Grant.—Where real estate has remained unoccupied and uninclosed, the constructive possession follows the legal title, and the presumption of a grant does not arise in favor of the holder of a conveyance from a grantor not shown to have title, by mere lapse of time, though the claimants thereunder have paid the taxes on the property.—SPRATLIN v. HALLIBURTON, Ark., 39 S. W. Rep. 712.

193. QUITCLAIM DEED — Adverse Possession. — Conveyance by deed of quitclaim and release of land acquired by adverse possession gives the grantee a "record title" thereto (St. 1893, ch. 340, § 1), so as to entitle him to maintain proceedings to quiet title; Pub. St. ch. 120, § 2, providing that such a deed "shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." — EX PARTE CONNOLLEY, Mass., 46 N. E. Rep. 618.

194. RAILROAD COMPANY — Fires — Negligence. — A farmer is not bound to use unusual precautionary measures to protect his property from injury by fire set by locomotives on an adjoining right of way.—NEW YORK, C. & ST. L. R. CO. v. GROSSMAN, Ind., 46 N. E. Rep. 546.

195. RAILROAD COMPANY—Negligence of Fellow-servants.—Where a railroad company supplies extra links for the use of trainmen and those who make up trains at the yards, the death of a freight conductor, resulting from the use of a defective link, is due to the negligence of fellow-servants. — YOUNG v. BOSTON & M. R. R., Mass., 46 N. E. Rep. 624.

196. RAILROAD COMPANY—Relief Department—Beneficiary.—One of the rules in the relief department of a railroad company provided that all claims of beneficiaries should be submitted to the determination of the superintendent, whose decision should be final and conclusive, unless appealed to the advisory committee, and in case of such appeal the decision of the committee should be final and conclusive upon all parties, without exception or appeal: Held that, after the rejection of a valid claim by the advisory committee, the beneficiary could maintain an action in court for the recovery of the money due thereon, and that such rule is not a bar to the action. — BALTIMORE & O. R. CO. v. STANKARD, Ohio, 46 N. E. Rep. 577.

197. RAILROAD COMPANY — Street Railway—Injury to Child.—If, with due attention, the motorman of a street car could and should have perceived a child of tender age on or straying near the tracks under circumstances indicating the great danger of the child, the motorman should seasonably use the preventive means to avert the accident; and his failure in that respect, resulting in injury to the child, will make the railroad company liable for the injury. — NELSON v. CRESCENT CITY R. CO., La., 21 South. Rep. 634.

198. RAILROADS—Appropriation by Consent.—Where a railroad company has taken possession of land for its right of way, and incorporated it as part of its permanent railroad track, with the verbal consent of the owner, on condition of compensation verbally promised, but refused and not performed, and without appropriation proceedings, and without any agreement in writing with the owner, such owner has an election of remedies, either (1) to proceed in the probate court to compel appropriation under section 6448, Rev. St., or (2) by assenting to such possession by the company as an appropriation in fact, and tendering conveyance, to proceed in the court of common pleas to recover compensation.—FRIES v. WHEELING & L. E. RY. CO., Ohio, 46 N. E. Rep. 516.

199. REPLEVIN—Bills and Notes.—The maker of promissory notes is not the owner or entitled to the immediate possession thereof unless the same have been paid or canceled by a court, and until such payment or order an action of replevin for the recovery of the possession thereof will not lie. — OLSON v. THOMPSON, Okla., 48 Pac. Rep. 184.

200. REPLEVIN — Complaint.—A plaintiff in replevin, who claims a special ownership by virtue of a chattel mortgage, must, in his petition, allege facts showing his interest in the property in controversy, and also facts which entitle him to the immediate possession thereof.—NORCROSS v. BALDWIN, Neb., 70 N. W. Rep. 511.

201. REPLEVIN—Demand and Tender.—In replevin of oxen bought by plaintiffs of defendant, and paid for in part only, it appeared that a demand, unaccompanied by a tender, and without evidence of present ability to pay, was made by plaintiffs, two days after the time set for payment, at a place other than that of delivery, and that the demand was received in silence: Held, that demand and tender were not waived.—MINEAR v. PHELPS, Mich., 70 N. W. Rep. 422.

202. REPLEVIN — Parties. — In a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff, over defendant's objection. — FLANDERS v. LYON & HEALEY, Neb., 70 N. W. Rep. 524.

203. RES JUDICATA—Abatement.—The pendency of an action by a purchaser of goods to rescind the contract, and for damages, is not a bar to an action by the seller for the price, where he has not attempted to use his claim as a set off in the former suit.—JENNISON HARDWARE CO. v. GODKIN, Mich., 70 N. W. Rep. 428.

204. SALE—Breach of Warranty. — An implied warranty that the elevators sold to defendant are suitable for the purpose for which they are to be used, does not entitle him, in an action for the price, to set off the cost of repairing defects in his building in order to accommodate and properly operate the elevators. — REEDY v. WEAKLEY, Tenn., 39 S. W. Rep. 739.

205. SALES — Construction of Contract.—A memorandum simply set forth certain sizes and classes of lumber, fixed the selling price thereof, and did not either expressly or by clear intendment create a warranty that the lumber should be of a width and thickness different to that usually known to the trade: Held, that the memorandum should be construed as describing the kind of lumber wanted, and not as a warranty as to its width and thickness. — BROWN v. BAIRD, Okla., 48 Pac. Rep. 180.

206. SALE—Executory Contract. — An agreement that the seller of hogs shall retain possession and feed them till a certain date; that, before delivery, they shall be weighed at certain scales, and the balance of the price be paid; and that, if any of them become sick before time for delivery, the buyer shall at once receive them or release all claim thereto,—is an executory contract, and passes no title.—BRANIGAN v. HENDRICKS, Ind., 46 N. E. Rep. 560.

207. SALE—Growing Crops—Delivery.—Growing crops, not being capable of manual delivery, are not "in the possession or under the control of the vendor," within the statute requiring an immediate delivery and continued change of possession to render a sale valid, and a sale of growing wheat is valid where the purchaser took a bill of sale, and, as soon as the grain was harvested, took possession, and marked the sacks with his initial, and continued to exercise such acts of ownership as are usual under the circumstances. — O'BRIEN v. BALLOU, Cal., 48 Pac. Rep. 130.

208. SALE BY RECEIVERS—Enforcement of Payment.—This court has jurisdiction, by summary proceedings, upon petition, to compel the payment by a purchaser from an officer of the court of the agreed price of goods sold and delivered.—MCCARTER v. FINCH, N. J., 36 Atl. Rep. 987.

209. SCHOOL TOWNSHIP—Notes—Attorney's Fee.—A school township is not liable on an attorney fee clause in its note, its powers to contract being only such as

are given it by statute.—SNODDY v. WABASH SCHOOL TP. OF FOUNTAIN COUNTY, Ind., 46 N. E. Rep. 588.

210. SHERIFFS—Duties.—A sheriff cannot exonerate himself from the performance of his official duties in levying an attachment or execution upon personal property by claiming to have possession of the same property under chattel mortgages.—CHITTENDEN v. CROSBY, Kan., 48 Pac. Rep. 209.

211. SLANDER—Evidence.—On a trial for slander by stating that plaintiff had poisoned defendant, an instruction that it must be shown that the words were spoken by defendant with intent to say and publish that plaintiff intentionally poisoned defendant, and was guilty of an attempt to murder him, and unless such intent was established the jury should find for defendant, was erroneous.—FURR v. SPEED, Miss., 21 South. Rep. 562.

212. SPECIFIC PERFORMANCE.—An obvious limitation of the power to compel specific performance arises when the act required to be performed is beyond the ability of the defendant.—CAPERTON v. FORREY, La., 21 South. Rep. 600.

213. SPECIFIC PERFORMANCE — Contract.—Where a contract for the sale of land provided also for the construction of a ditch by the purchaser, the cost to be borne equally by the parties, a tender by the purchaser of the difference between the purchase price and the amount he claimed to be due him from the vendor on the cost of the ditch is insufficient to support a bill for specific performance, in the absence of proof of a valid agreement that such cost should be deducted from the price.—BIDWELL v. GARRISON, N. J., 36 Atl. Rep. 941.

214. STATES—Acceptance of Bequest.—Only the legislature, and not the State treasurer, has power to accept a bequest to the State in trust.—STATE v. BLAKE, Conn., 36 Atl. Rep. 1019.

215. STATUTES—Construction.—The office of a proviso to is restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it; and, where it follows and restricts an enacting clause general in its scope and language, it is to be construed strictly, and limited to objects fairly within its terms.—SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. D'ALEMBERTE, Fla., 21 South. Rep. 570.

216. STATUTES — Construction — Incompatibility.—Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute.—CITY OF CINCINNATI v. HOLMES, Ohio, 46 N. E. Rep. 514.

217. TAXATION—Equalization of Assessment.—The action of a board of equalization in raising an assessment of personal property being final, and no right of appeal having been given by statute, where such action was taken regularly, on notice and after the introduction of evidence, and the property is such that there may be an honest difference of opinion as to its value, an allegation of fraud in general terms, based solely on the act of the board in placing what is claimed to be too high a valuation on the property, is not sufficient to give the court jurisdiction to review such action.—OLYMPIA WATERWORKS v. GELBACH, Wash., 48 Pac. Rep. 251.

218. TAXATION—Special Tax Bill.—A suit to enforce a special tax bill, in which validity of the tax only is assailed, does not involve "title to real estate," so as to give the supreme court appellate jurisdiction.—BARBER ASPHALT PAVING CO. v. HEZEL, Mo., 39 S. W. Rep. 781.

219. TAXATION OF FOREIGN CORPORATION.—A foreign corporation had an agent here, where it received and where it sold fruit, and received the price for the same. Part of the proceeds were withheld in the hands of the agents for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent; also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms: Held, an assessment of the cash in bank of said corporation is proper, and warranted by the provisions of Act No. 106 of 1890—an act to provide an annual revenue for the State.—BLUEFIELDS BANANA CO. v. BOARD OF ASSESSORS, La., 21 South. Rep. 627.

220. TAX DEEDS—Adverse Possession.—A tax deed, though void and based upon a void sale, if not showing invalidity on its face, is a sufficient color of title to be a foundation for adverse possession.—BARTLETT v. AMBROSE, U. S. C. C. of App., Fourth Circuit, 78 Fed. Rep. 889.

221. TELEGRAPHS AND TELEPHONES—Rights in Streets.—A corporation chartered as a telephone and telegraph company, and which maintains a telephone system through which, under contracts with its subscribers and with a company maintaining a telegraph system, its subscribers are connected with and transmit messages to the telegraph company, to be sent to points in other States and foreign countries, is entitled to the rights given by the act of congress of July 24, 1866, to aid in the construction of telegraph lines, and, on complying with the act, has the privilege of running its lines over and through the streets of a city, which are post roads of the United States, and such city has no right to prevent it from so doing, though it must pay its due proportion of taxes, and submit to the ordinary reasonable regulations of the State and city.—SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF RICHMOND, U. S. C. C., E. D. (Va.), 78 Fed. Rep. 858.

222. TENANCY IN COMMON—Improvements—Partition.—Where a tenant in common improves the property of his own motion, at his own expense, equity will not grant a partition, without directing an account and suitable compensation for such improvements.—BALLOU v. BALLOU, Va., 26 S. E. Rep. 840.

223. TRESPASS — Possession.—Trespass will not lie against one in actual possession of land under claim of title.—NEWCOMB v. LOVE, Mich., 70 N. W. Rep. 448.

224. TRESPASS TO TRY TITLE—Pleading.—Where defendant in trespass to try title would have to deraign his title through a forged deed in the absence of limitations, the fact that he claims under a forged deed can only be shown to avoid the statute of limitations under Rev. St. 1895, art. 3342, providing that limitations shall not apply to one in possession of land when, in the absence of the statute, he would deraign title through a forged deed, when specially pleaded.—HARRIS v. LINBERG, Tex., 39 S. W. Rep. 651.

225. TRIAL—Instruction.—An instruction is erroneous which states hypothetically a fact for determination by the jury, which is material to the issue submitted, but as to which there is no evidence.—ROBINSON v. SPEARS, Miss., 21 South. Rep. 554.

226. TRIAL — Voluntary Nonsuit. — The failure of plaintiff to appear, either in person or by attorney, when the case is called, shows his election to take a nonsuit; and it is error to call a jury, allow defendant to present his evidence, and direct a verdict in his favor.—CRUMLEY v. LUTZ, Penn., 36 Atl. Rep. 929.

227. TRUST — Acceptance.—Where a syndicate was formed for the purchase of land, and the title was conveyed to a disinterested party, who executed notes for the unpaid balance of the land in his own name, and at the same time prepared a declaration of trust to each one of the members of the syndicate, providing, among other things, that each member should, when due, pay his proportionate share of the unpaid purchase money, and such declaration of trust was given to such members, and retained by them, they are bound by such declaration, though they may not have read it or informed themselves of its contents.—PORTER v. WOODS, Mo., 39 S. W. Rep. 794.

228. TRUST—Decree—Construction.—A decree vesting title to land in a trustee, for the separate use of a

married woman during her natural life, the land to "descend," at her death, to her children by a particular husband, gives her a life estate only, notwithstanding a provision that the land "may be sold by the trustee, and reinvested, at the instance" of the beneficiary.—WILLIAMS v. VANTRESE, Tenn., 39 S. W. Rep. 741.

229. VENDOR AND PURCHASER—Assumption of Mortgage.—Where grantees covenant to pay as part of the price a note given by the grantor for the land, the grantor agreeing to pay them one-half thereof for them to apply on the note, the original vendor cannot, after payment by the grantees of one-half of the note, recover the balance from them, the grantor having failed to pay them the other half as agreed.—ELLETT v. MCGHEE, Va., 26 S. E. Rep. 874.

230. VENDOR AND PURCHASER—Bona Fide Purchaser.—A purchaser of real estate for a valuable consideration will be protected in his title in the absence of actual notice of fraud in the purchase of the property by the vendor, unless he has knowledge of facts which should, in reason, put him on inquiry.—ANDERSON v. BLOOD, N. Y., 48 Pac. Rep. 493.

231. VENDOR AND PURCHASER — Bond against Incumbrances.—A bond executed by a vendor to his vendee, conditioned that he should protect the vendee from payment of a purchase-money note previously given by the vendor for the land conveyed, and from all other liens thereon, is not a warranty of title, and hence, though title fails, there can be no recovery on the bond unless it is shown that the purchaser has paid such note, or some other lien.—CLAYTON v. FRANCO-TEXAN LAND CO., Tex., 39 S. W. Rep. 645.

232. VENDOR AND PURCHASER — Lien.—An innocent purchaser of a fictitious purchase-money note given the vendor after execution of the real purchase-money note takes it subject to the genuine note, where the vendor's lien was recorded and no release has been filed.—SOUTHERN BUILDING & LOAN ASSN. v. BRACKETT, Tex., 39 S. W. Rep. 619.

233. VENDOR AND PURCHASER — Sale of Land Subject to Lien.—A purchaser of land subject to a lien, who does not assume payment of the debt secured, is not personally liable therefor.—GARZA v. HAMMOND, Tex., 39 S. W. Rep. 610.

234. VENDOR AND PURCHASER — Sale of Mortgaged Premises — Assumption of Mortgage.—An agreement by the purchaser of mortgaged premises to assume the mortgage, and save the grantor harmless therefrom, is an absolute undertaking to pay the mortgage debt when due, and not a mere contract of indemnity.—HAAS v. DUDLEY, Oreg., 48 Pac. Rep. 168.

235. VENDOR AND PURCHASER — Vendor's Lien.—A contract, by the complainant in a suit to enforce a vendor's lien, to pay defendant for influencing voters n favor of his candidacy for public office by crediting the value of the services on the purchase notes, is void, as against public policy.—WHITMAN v. EWIN, Tenn., 39 S. W. Rep. 742.

236. WATERS—Navigable Water—Control by United States.—All navigable waters are under the control of the United States for the purpose of regulating and improving the navigation, and though the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the federal government by the constitution.—GIBSON v. UNITED STATES, U. S. S. C., 17 S. C. Rep. 578.

237. WATERS — Unreasonable Diversion.—Where water-works erected at a lake are of a permanent character, but the injury by their use to other riparian owners is not permanent, but results from the diminution of the water supply because of the dryness of the season, riparian owners, in an action for damages, can recover such only as have accrued at the commencement of the action.—VALPARAISO CITY WATER CO. v. DICKOVER, Ind., 46 N. E. Rep. 591.

238. WILLS — Description of Devisees.—Testatrix devised certain real estate to her nephew, "and at his death to his surviving children." By other clauses of her will, she made bequests to "his children:" Held, that all of the children of the nephew, including those born after the testator's death, who were living at the death of the nephew, took an estate in the property devised.—CHEATHAM v. GOWER, Va., 26 S. E. Rep. 858.

239. WILLS — Maintenance of Infant.—Testator's wife is made a subtrustee for the benefit of his granddaughter by a will providing that the income of certain property should be paid to the wife, from which she was directed to support and educate the granddaughter, and that, if the wife died before the granddaughter attained her majority, the income of a certain share of testator's property should be paid to the granddaughter's guardian. The support and education of the granddaughter as a member of the wife's family is *prima facie* a reasonable performance of the trust, it appearing that during testator's life she was a member of his family; and therefore, where such performance is offered in good faith, and there is no evidence that, by change of circumstances, it has become unreasonable, payments for the granddaughter's separate support will not be required.—CONOVER v. FISHER, N. J., 36 Atl. Rep. 948.

240. WILL — Olographic Wills.—The will in controversy was written on a printed heading. An olograph will must be entirely written, dated, and signed by the testator. However conclusive the evidence that it contains the dispositions of the testator, it is none the less null, unless the essential formalities are complied with. The date includes the year, month, and day, any one of which, being missing, is fatal to the validity of the will. The document attests the "printed heading," and shows conclusively that the date was not written by the testator. The testimony of witnesses (whose attention, it appears, was not called to the printed headlines), that the will was written by the testator, will not overcome the fact, made manifest by the testament itself, that it was not entirely written by the testator.—SUCCESSION OF ROBERTSON, La., 21 South. Rep. 586.

241. WILL—Power.—Where a testator willed his property to his wife during widowhood, with absolute power to dispose of it by will, which power the widow executed by devising the property to volunteers, leaving debts of her own unprovided for, the property so devised became a part of her estate on her death, subject to the claims of her creditors.—FREEMAN'S ADMR. v. BUTTERS, Va., 26 S. E. Rep. 845.

242. WILL—Powers—Execution.—Under a will giving to testator's son, in trust for testator's daughter, all property not given to the son, appointing his son and son-in-law executors, providing, "If occasion should arise, in the opinion of my executors, to sell any portion of my estate, they are hereby authorized to make such sale, and to reinvest the proceeds to such uses as are prescribed in relation to the property sold;" and also provided cross-remainders among the issue of his said son and daughter, and, if both should die without issue, then over, with directions to his executors for the ultimate partition and division of his estate,—the power to sell and reinvest is a power coupled with a trust (the executorship), and conferred on the office of executor, and therefore may be executed by the surviving executor.—DICK v. HARBY, S. Car., 26 S. E. Rep. 900.

243. WILLS—Vesting of Title.—A wife by will directed her executors to improve her separate real estate, and lease it until her younger child should become 21 years old, when one-half of it should belong to the husband and one-fourth to each of the children, and directed one-half of the net income, in the meantime, to be paid to the husband, and one-fourth to each of the children: Held, that title to one-half the land vested in the husband, even if it did not take effect for all purposes until the will was probated.—CHRISTOFFERSON v. PFENNIG, Wash., 48 Pac. Rep. 264.